BEFORE THE IOWA CIVIL RIGHTS COMMISSION

JAMES A. MONTZ, Complainant, and IOWA CIVIL RIGHTS COMMISSION,

VS.

CIVIL SERVICE COMMISSION and CITY OF ESTHERVILLE, IOWA, Respondents.

CP# 10-89-19298

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination on the basis of age in employment, filed by James A. Montz against the Respondents Civil Service Commission and City of Estherville, Iowa.

Complainant Montz alleges that the Respondents informed him that there was a maximum age requirement for the position of police officer whereby the applicant must not be older than 33 years of age to be considered for the position. The Respondents' alleged failure to consider or hire him for the position of police officer due to his age was also tried during the hearing.

A five day public hearing on this complaint was held on May 14-17 and 30, 1991 before the Honorable Donald W. Bohlken, Administrative Law Judge, at Estherville, Iowa. The Complainant, James A. Montz, was represented by John C. Barrett, Attorney at Law., The Respondents, Civil Service Commission and City of Estherville, Iowa, were represented by James A. Albert, Attorney at Law. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General.

Initial briefs were filed on July 31, 1991. A reply brief was filed by the Commission on August 13,1991. A reply brief was filed by the Respondent on October 11, 1 991.

The findings of act and conclusions of law are incorporated in this contested case decision in accordance with Iowa Code Section 17A.1 6(l)(1991). The findings of fact are required to be based solely on evidence in the record and on matters officially noticed in the record. Id-. at 17A.16(l).

The Iowa Civil Rights Act requires that the existence of age discrimination be determined in light of the record as a whole. See Iowa Code § 601A.15(8)(1991). Therefore, all evidence in the record and matters officially noticed have been carefully reviewed. The use o' supporting transcript and exhibit references should not be interpreted to mean that contrary evidence has been overlooked or ignored.

In considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting from the believability of each witness. Due consideration has been given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate

the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way been supported or contradicted by other testimony or documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case,

RULINGS ON OBJECTIONS TO EVIDENCE

1. A number of objections were made to the admissibility of either testimony or exhibits. Many of these objections were simply noted in the record because evidence which would be excluded under the rules of evidence in a jury trial may be admitted in administrative hearings. Iowa code § 17A.14(l). When this procedure is followed, the objection, if it is found to be valid, may affect the weight given to the exhibit or testimony objected to, but the exhibit or testimony is admitted in the record and no ruling on the validity of the objection is made in the proposed decision.

2. Other testimony and exhibits were admitted subject to the objections with the understanding that the objections to them would be ruled upon in this decision. 161 IAC 4.2(5). This procedure is often followed when one of the objections is that the proffered evidence is irrelevant, immaterial, or unduly repetitious, all of which are grounds upon which the evidence should be excluded. See Iowa Code § 17A.14(l) (1991).

Respondents' Exhibit B:

3. Respondents' Exhibit B was admitted into the record subject to an objection on relevance. (Tr. at 150). The exhibit consists of a copy of a letter, dated March 12, 1991, from Emmet County Sheriff Larry Lamack to the Complainant's attorney's legal assistant which indicated that Complainant Montz did not achieve the minimum required score on an entry level test for the position of Deputy Sheriff in July of 1989. (R. EX. B). The exhibit was relevant at the time it was offered for two reasons: First, it was evidence of the existence of an incident which caused Complainant Montz some emotional distress. (Tr. at 153). Respondent could bring out this incident in an attempt to show that there were causes of Complainant's emotional distress which were independent of his treatment by Respondents. Second, at the time, Respondent argued that failure on this examination would demonstrate that Montz would have failed a written examination for Estherville police officer. Respondent subsequently waived this argument. (Tr. at 768-70). The objection is overruled based on the first rationale.

Complainant's Questions Concerning the Filling of Police Officer Positions After 1989:

4. The Respondents objected to the relevance of questions concerning the filling of police officer positions after 1989. They also asserted that inadequate notice was given as Montz' complaint focused on his rejection in 1989. (Tr. at 297). The questions were allowed subject to the objection. (Tr.at 299,315). The questions were.designed to establish whether the City continued to utilize the certified list established after Montz' application, whether it continued to enforce its maximum age hiring limit, and whether post 1989 vacancies were health related. All of these topics were relevant in determining whether the Respondents" policy constituted a continuing violation, as alleged in the complaint, and whether, in light of Respondents' assertion that its

maximum hiring age was a bona fide occupational qualification, this policy was actually effective in maintaining a physically fit police force. The objection as to relevance is overruled.

5. With respect to inadequate notice, the complaint alleges that the "date most recent or continuing discrimination took place" is on "September 4-8,1989 and continuing." The Complaint's main allegation is that the Respondents have instituted "an age requirement that the age: must be no older than 33 years old." A fair reading of the complaint is that the 1. most recent or continuing discrimination" alleged is the maintenance of the hiring age limit.

6. In determining what issues are fairly pled by an administrative civil rights complaint taken to hearing, it should be borne in mind that this is:

> an administrative proceeding foundationed upon a legislative enactment designed more to implement broad public policy than to adjudicate differences between private parties . . . [T]echnical rules of pleading have no application in an administrative proceeding. . . "[T]he key to pleading in an administrative process is nothing more nor less than opportunity to prepare and defend. And deficiencies in any pleading in that field may be cured by motion for more specific statement.
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> . . .
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> If [the individual] does not request [a continuance to meet the new issues] and elects instead to proceed with the hearing, he waives the claim of surprise. He may not subsequently challenge issues actually litigated; actual notice and adequate opportunity to cure surprise [by requesting a continuance] are all he is entitled to.

B. Schwartz, Administrative Law 285-86 § 6.5 (1984).

8. Neither a motion for more specific statement, as allowed by Iowa Code Section 17A.12(d), nor a motion for continuance was made by Respondents. The objection as to inadequate notice of the continuing violation is overruled.

Respondents' Exhibit AA:

9. The Complainant objected to the admission of the Commission's case summary and probable cause recommendation, Respondents' Exhibit AA, on the grounds of relevance. (Tr. at 668). The summary and recommendation is relevant for the purpose of establishing the bare facts that an investigation was conducted and that a recommendation was made by the investigator as required by law. See Iowa Code § 601A.15(3)(a). Although relevant for these purposes, it should be noted that neither the Commission nor the Administrative Law Judge are in any way bound to follow the recommendation, but are required to make their decision based on evidence in the record and matters officially noticed. See Iowa Code § 17A.12(8). The objection as to relevancy of Respondents' Exhibit AA is overruled.

Respondents' Exhibit CC:

10. The Complainant objected to the admission of Respondents' Exhibit CC, which consists of the transcript of the investigator's taped interviews with James Montz, Vaughn Brua, Gordon Forsyth, Paul Farber and Ben Yarrington, on the grounds of relevance. (Tr. at 677). The Respondents initially argued that Exhibit CC was relevant because it demonstrated that "Mr. Montz did not level with Ms. Hall during her investigation of this case and that because of that... her recommendation of probable cause is flawed..... it [also] goes to [Mr. Montz' credibility." (Tr. at 678). The Respondents subsequently decided that "the value of examining the factual accuracy of Ms. Hall's case summary and recommendation would be limited and I'm not going to do it." The Respondents also elected not to pursue questioning of Ms. Hall with respect to Mr. Montz' credibility. (Tr. at 680). Nonetheless, these interviews contain information relevant to the hiring process, liability, and the Respondents' bona fide occupational qualification defense. Under these circumstances, therefore, the objection as to relevancy is overruled.

Respondents' Exhibits BB and FF.

11. The Complainant also objected to Respondents' Exhibits BB and FF on the grounds of relevancy. (Tr. at 682, 806). Exhibit BB is a form which verifies that this case was cross filed with the Equal Opportunity Employment Commission, the agency which enforces the Age Discrimination in Employment Act (ADEA). This exhibit was offered solely as a predicate to Respondents" Exhibit FF. (Tr. at 683). Therefore, its relevancy is tied to the relevancy of Exhibit FF. If Exhibit FF is not relevant to this case, neither is Exhibit BB.

12. Exhibit FF is an Equal Opportunity Employment Commission (EEOC) post-investigation determination, dated April 20,1991, indicating that "the evidence obtained during the investigation does not establish a violation of the [federal Age Discrimination in Employment Act]." Respondents asserted that Exhibit FF was offered with respect to their bona fide occupational qualification defense and the analytical framework for determining whether an age qualification is a BFOQ for a particular position. (Tr. at 683, 807).

13. Exhibit FF makes no mention, however, of any BFOQ analysis. It simply states that "[i]t is not unlawful under the ADEA for an employer which is a State..... (or) an agency or instrumentality of a State to fail or refuse to hire any individual because of age when such action is taken with respect to employment as a law enforcement officer." This statement paraphrases a specific, temporary, statutory exemption, 29 U.S.C. § 623(i), in the ADEA for law enforcement officer positions which was enacted in 1986. Age Discrimination in Employment Act Amendments of 1096, Pub. L. No. 99-592, § 3(a), 100 Stat. 3342 (cited in 4 H. Eglit, Age Discrimination, App F-8 n.7 (1992). The provision will be automatically repealed on December 31, 1993. Id. at § 7(a).

14. Given this specific exemption for law enforcement officers, there was no reason for the EEOC to analyze Estherville's age requirement under the ADEA's BFOQ exemption which is set forth at 29 U.S.C. Section 623 (f)(1). It should be noted that the ADEA's temporary exemption for law enforcement officer positions does not control the result under the Iowa Civil Rights Act as the ADEA does not pre-empt the Act or other state laws which offer greater protection against

age discrimination than is offered by the AEA. Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989); 3 H. Eglit, Age Discrimination § 17.15 (1992).

15. Exhibits BB and FF do not have "any tendency to make the existence of any fact that is of consequence to the determination of th[is] action more probable or less probable than it would be without this evidence." Iowa R. Evid. 401 (Definition of "relevant evidence"). The objection is sustained. These exhibits are not relevant evidence and are stricken from the record.

Complainant's Questions Concerning Whether the Respondents Had Waived Minimum Requirements for Applicants:

16. Respondents objected to a line of questions on whether or not Robert Burdorf, (who was eventually hired from the certified list which resulted from the competitive process which Complainant Montz was not permitted to participate in), was allowed to participate in the testing process despite his failure to possess a valid Iowa driver's license at the time he applied. (Tr. at 1099, 1101). These questions were relevant to determining whether, and under what conditions, Respondents were willing to waive or delay fulfillment of the established minimum qualifications by applicants for the police officer position. This information is relevant because Respondents asserted that Complainant Montz failure to meet other minimum requirements, i.e. an Associate of the Arts degree in law enforcement or ILEA certification or the equivalent, were either reasons for not permitting him to compete at the time of his rejection or would have resulted in his rejection in the event he had not been rejected due to his age. Respondents' objection as to relevancy is overruled.

Respondents' Exhibit PP.

17. Respondents' Exhibit PP is a summary of a 1975 case decided by the Florida Supreme Court upholding a maximum age hiring limit established by the Florida Highway Patrol. The plaintiff, an applicant excluded by this limit, asserted he was thereby denied the equal protection of the laws guaranteed by the 14th amendment to the Constitution of the United States. The exhibit was not offered for the validity of the legal opinions stated therein, (Tr. at 1148), but simply to show that the Respondents relied on legal advice and analysis given by the city attorney, which included this summary. (Tr. at 1147, 1148). It is relevant for this limited purpose. The objection is overruled. It should be noted that the question, of whether reliance on legal advice constitutes a valid defense to a discrimination claim under the Iowa Civil Rights Act, will be considered in the conclusions of law.

RULING ON MOTION TO DISMISS

1. Respondents made a motion to dismiss based on the proposition that Complainant Montz had failed to prove the two of the elements of a prima facie case of failure to hire on the basis of age which was set forth in Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 177 (Iowa Ct. App. 1988). (Tr. at 956-60). This analysis relies on the prima facie case and order and allocation of proof which were originally set forth in McDonnell Douqlas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), and subsequently adopted by the Iowa Supreme Court, e.g. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa

1985): Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522,530 (Iowa 1985).

2. In this case, however, there is overwhelming direct evidence that Respondents applied a maximum age hiring policy whereby applicants who would be age 33 or over at the time of their appointment would be rejected due to their age, and that age, in accordance with this policy, was the motivating factor in the Respondents' rejection of Complainant Montz's and Riley Fairchild's applications. (CP. EX. 2, 55, 56; Tr. at 62, 65, 68, 96, 276-78, 288-90, 319, 324, 350, 478, 481, 494, 530-532,1139,1159-60,1177,1185-87,1207-09).

3. "Direct evidence" is that "evidence, which if believed, proves existence of [the) fact in issue without inference or presumption." It is "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect". BLACK'S LAW DICTIONARY 412-14 (1979). Either policies which on their face call for consideration of a prohibited factor or statements by management personnel involved in the hiring process which reflect bias constitute direct evidence of discrimination. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-789 (2nd ed. 1989).

4. With the presence of direct evidence, the McDonnell-Douglas analytical framework, involving shifting burdens of production, is inapplicable. Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S.. 228, 109 S. Ot. 1775, 104 L. Ed. 2d 268, 301 (1989) (O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989). The McDonnell Douglas prima facie case, therefore, does not apply where there is direct evidence of discrimination because:

> [T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.

Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S, Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). *See also* ' Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

5. The McDonnell-Douglas prima facie case and order and allocation of proof is also not appropriate for this or any case where the Respondent assert a Bona Fide Occupational Qualification defense. See 2 H. Eglit, Age Discrimination, § 16.25 & n.6(1992).

6.

> [B]y contending that the policy which generated the action in question constitutes a BFOQ, the defendant in effect admits that it engaged in age discrimination but that, because of the BFOQ exception, it is not liable for violating the act. This BFOQ exception constitutes an affirmative defense to which the defendant bears the burden of [persuasion].

Id. at § 16.25.

7. Even if the order and allocation of proof set forth in McDonnell-Douglas were appropriate to this case:

> The McDonnell-Douglas formulation of the facts adequate to establish a prima facie case, on which the prima facie case set forth in Wing us based, is not:
>
> > the only means of establishing a prima facie case of individual discrimination. . . . The facts necessarily will vary in [employment discrimination] cases, and the specification ... of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations. The importance of McDonnell-Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [employment discrimination] plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 70 (1990) (quoting Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396,429 (1977) (emphasis added)). The direct evidence previously cited would undoubtedly establish a prima facie case of age discrimination under the McDonnell-Douglas order and allocation of proof

8. Respondent's Motion to Dismiss is overruled.

FINDINGS OF FACT

Jurisdictional and Procedural Facts:

1. On September 28, 1989, Complainant James A. Montz filed his complaint, CP#10-89-19298, alleging age discrimination in employment which is prohibited by Iowa Code section 601A.6. The dates of alleged discrimination stated in the complaint are "September 4-8, 1989 and continuing." (CP. EX. #50). Official notice is taken that September 28, 1989 is twenty days after September 8, 1989. Fairness to the parties does not require that they be given an opportunity to contest this fact.

2. This complaint was investigated. After probable cause was found, conciliation was attempted and failed. (CP. EX. # 51; R. EX. Y, Z, AA). Notice of Hearing was issued on January 16,1991. The hearing was held on May 14-17 and 30,1991.

Background of Complainant Montz:

3. Complainant James A. Montz was born on December 22, 1945. In September of 1989, therefore, he was forty-three years old. (CP. EX. # 53; Tr. at 11). Complainant Montz graduated

from high school in Gruver, Iowa in 1963. In that year, he also attended one semester at Estherville Community College. (CP. EX #53; Tr. at 12).

4. Complainant Montz then joined the Navy and served in various locations from February 1964 to December 1984, when he was honorably discharged in Brunswick, Maine. During twenty years of his service, he was employed as an aerographer (weather forecaster). CP. EX. #53; Tr. at 16, 19, 20-23, 24, 25, 30).

5. While still in the Navy, Complainant Montz developed an interest in becoming a law enforcement officer. He had served on the reserve base police force while stationed in Guam. (Tr. at 31). He also volunteered and was selected for shore patrol, which, is not a vocational speciality in the Navy. (Tr. at 62729).

6. He began working as a reserve deputy with the Sagadahoc County, Maine sheriff's department approximately six months before he left the Navy. (Tr. at 30). During this time, he would ride with regular deputies and gain knowledge and expertise in law enforcement. He could not make arrests until he had completed the Maine Reserve Officer School. (CP. EX. # 53; Tr. at 31).
7. On April 19, 1985, within five months after his discharge, Complainant Montz completed the two week Reserve Officer School at his own expense. (CP. EX. # 53; Tr. at 31, 607). This enabled him to undertake the full sworn duties and responsibilities of a police officer as a reserve deputy. (Tr. at 31).

8. He was assigned to a park, Popham Beach, in order to relieve deputies there who were then free to patrol the county. He was required to wear a fire arm, make reports and allowed to make arrests. He would also transport prisoners. The reserve position was as intellectually and physically demanding as a regular police officer position. Montz served as reserve deputy for approximately three years. (CP. EX. # 53; Tr. at 32-34, 35).

9. In February, 1986, the Complainant became a full-time police officer with the Police Department of Bath, Maine. (CP. # 53; Tr. at 35, 39). On March 27, 1987, he completed the twelve week Municipal/County Basic Police School at the Maine Criminal Justice Academy, which is the state training course designed for regular Maine police officers, not reserve officers. (CP. EX # 53; Tr. at 34,39,48). During his employment with the Bath Police, Department, he also underwent required continuing in-service education. This included a two day course which resulted in Montz being certified on the intoxilizer, a device which measures blood/alcohol content. Other courses included the handling of hazardous wastes at accident scenes, "Infectious Disease Instruction," "Roadblocks," "Liquor Laws", and "Selective Patrol Drug Enforcement," (CP. EX. # 53;Tr. at 50).

10. In Bath, Complainant Montz worked for a department consisting of 17 police officers and a chief. The city had a population of approximately 10,000. A major employer, the Bathiron Works, also employed 10,000 people who came into the city to work. (Tr. at 40). In this environment, Montz performed all the duties of a patrol officer including enforcing all city regulations and state codes on vehicles, criminal law, parking ordinances, and animal control. The majority of the time he worked in a marked patrol unit at all hours on rotating shifts. He also

did two hour foot patrols at night. (Tr. at 41-42). He made arrests, including arrests where physical force had to be used. (Tr. at 42-45).

11. In March 1989, after three years in the Bath Police Department, Complainant Montz resigned in good standing with the Department. He and his family then moved to Estherville in order to take care of his mother who has Alzheimer's disease. (CP. EX. # 53; Tr. at 41, 51, 53, 608).

Background of Respondents City of Estherville and Civil Service Commission:

12. The City of Estherville, Iowa has a population of approximately 6,700 people. It has a student population of approximately 400 high school students and 500 students at lowa,Lakes Community College. Estherville is located near the Iowa Lake3 which results in there being an increase in the population due to people who live in Estherville while working at the Lakes. This proximity to a resort area sometimes causes problems, such as loud parties, with younger people who get involved with alcohol. (Tr. at 993-95).

13. The Estherville Police Department consists of Chief Paul Farber, a captain, two sergeants, and eight police officers. Chief Farber is the administrative head of the department and handles the scheduling, budgeting, and training for the department. His is the only "desk job." All other officers do patrol work. (Tr. at 998). Officers are required to know different techniques and skills. Some officers, for example, handle the Law Enforcement Intelligence Network, which is a communications system utilized by officers conducting criminal investigations. One officer does accident reconstruction. Three officers are advanced accident investigators. Other officers also do community work, such as education on drug abuse, in addition to patrol work. (Tr. at 998-999).

14. The Estherville Civil Service Commission was founded in 1934. It was established to eliminate political cronyism in staffing, to set hiring and promotion standards, and to administer an appeal process for discharged police officers. (Tr. at 113031,1134). The Commission consists of three members. It is involved with the hiring and discharge of no city employees other than the police. (Tr. at 257). In 1989, Vaughn Brua served as secretary to the Civil Service Commission. Mr. Brua was also employed as the city clerk and finance director of the City of Estherville. (Tr. at 256). The secretary is not a member of the Commission, but a staff person who does record retention, takes minutes,, and performs other miscellaneous functions. (R. Ex. J; Tr. at 256). The chairman of the Commission in 1989 was Barry Huntsinger, who has been on the Commission for twenty years. (Tr. at 1128-1130).

The Hiring Process:

15. Chief Farber became aware of an opening when he learned that an officer would be leaving on disability pension in August of 1989. (Tr. at 293). As there was a vacancy in a police officer position, and there was no current certified list of candidates, he requested that a meeting of the Civil Service Commission be held. (Tr. at 257, 290-91, 1134). The secretary of the Commission was then directed to and did place advertisements for the position in the Des Moines Register and the local paper. (CP. EX. 52, 77; Tr. at 258, 261, 1170). A closing date for submission of applications, of September 22, 1989, and a test date for written and physical agility tests, of September 30, 1989, were also set. (CP. EX. 6, 52, 77-1 Tr. at 258, 977).

16. Potential applicants would either contact the Civil Service Commission by mail or by personally coming to the office and request applications. They were given application packets which included a list of requirements for the position, the application, and other forms. (CP. EX. 53; Tr. at 62, 265, 977, 1170). A list of persons requesting applications was kept. (CP. Ex. 57; Tr. at 265, 266-67). At least thirty-three individuals requested applications. Of those, sixteen made application for the position. (CP. EX. 1-5, 7, 9, 11, 14-19, 53; Tr. at 267-69).

17. All applications received were reviewed by Commission Secretary Vaughn Brua to determine whether all the necessary forms are completed. (Tr. at 27G, 1171). In September of 1989, he alone made the final determination concerning whether those of the Commission's minimum standards, which could be shown to have been satisfied by review of the application, were, in fact, met by the applicant. (Tr. at 270, 271, 275-76). Applicants who did not meet the minimum standards were so informed by letter. (Tr. at 271).

18. Applicants who were found to have met the minimum standards were sent letters notifying them of the test date and location. (CP. EX. #6; Tr. at 27174). The written, psychological, and physical agility tests were administered to the remaining applicants by the Civil Service Commission. (Tr. at 273, 278, 27980, 1074). The Commission then reviewed the scores and compiled a certified list composed of eight candidates who (a) were not screened out by the psychological test, and (b) had received the highest test scores. All candidates who did not make the certified list were so informed by letter. (Tr. at 279, 977, 1078, 1080, 1075, 1134, 1171, 1172).

19. The certified list was then transmitted to police chief Farber. (Tr. at 1074, 1174). Chief Farber then began doing background checks on the certified list candidates. He also established a time for the candidates to do oral interviews with himself and other staff members. After the oral interviews, Chief Farber made the final decision as to who should be hired. (Tr. at 978).

Complainant Montz' Application:

20. Once Complainant Montz saw the advertisement for the police officer position in the Estherville Daily News, he obtained a complete application packet approximately one to two weeks before the closing date for applications. (CP. EX. 52; Tr. at 58, 62). While reviewing the packet, he noticed item "a" on the list of the minimum standards which required than an officer:

Has reached his or her twentieth birthday and *has not reached his or her thirty-third birthday at the time of his or her appointment.*

(CP. EX. 55; Tr. at 62-63).

21. This standard did not appear to Montz to be consistent with either the advertisement indicating the City of Estherville was an "E.O.E." i.e. an "Equal Opportunity Employer," or the reference in the application to the federal Age Discrimination in Employment Act. Therefore, Montz sought clarification of the Civil Service Commission's policy from Vaughn Brau, the Commission's secretary. (CP. Ex. 52, 53; Tr. at 63-66, 263). Brau informed him that the reason

for the age requirement was a chapter of the Iowa Code, covering the retirement of police and fire personnel, which indicates that officers must serve 22 years and reach age 55 in order to be eligible for early, voluntary retirement. (R. EX. U; Tr. at 66-67). Apparently this was a reference to Iowa Code section 411.6(l) (a). (R. EX. JJ).

22. After speaking to Brua, Complainant Montz talked to Chief Farber about the age requirement. (Tr. at 96, 98). Farber informed him that he didn't have any objections to having an older officer with, experience and training in the department. (Tr. at 9e 99). At that time, they also discussed the requirement than an officer:

Must be certified by the Iowa Law Enforcement Academy or have a two year Associate Degree in Law Enforcement or equivalent.

(CP. EX. 55; Tr. at 97-98, 205). Chief Farber informed Montz that, as a person with out of state certification from Maine, he could meet the Iowa Law Enforcement Academy (ILEA) certification requirement either by taking a test or by attending the five week course at the academy. (Tr. at 97-98, 205).

23. Despite the age requirement, Complainant Montz submitted his application to the City of Estherville on September 21, 1989. (CP. EX. #53; Tr. at 67). Since the advertisement had indicated that the City was an equal opportunity employer, and the application form indicated age discrimination was prohibited, he felt he had a right to apply and be considered for the job. (CP. EX. 52, 53; Tr. at 68). On the same day that Montz submitted his application, Vaughn Brua sent him a rejection letter. (CP. EX. #56; R. EX. U; Tr. at 68-69,-277, 290, 481, 531).
24. The body of the letter stated in full:

Based on the information contained in your application, specifically a birth date of December 22, 1945, you would not qualify under the minimum standards established by the Civil Service Commission. I am enclosing a copy of our Minimum Standards for Police Officers. Item "a" establishes minimum and maximum ages.

I am sorry we are unable to consider you for the position of police officer. Thank you for your interest.

(CP. EX. #56) (emphasis, added).,This rejection letter was received by Montz on September 22, 1989. (Tr. at 68).

Direct Evidence of Discrimination:

Implementation, Maintenance and Application of Maximum Age Hiring Policy.

25. As previously noted:
there is overwhelming direct evidence that Respondents applied a maximum age hiring policy whereby applicants who would be age 33 or over at the time of their appointment would be rejected due to their age, and that age, in accordance with this policy, was the motivating factor in the Respondents' rejection of Complainant Montz's and Riley Fairchild's applications.

(Ruling on Motion to Dismiss-paragraph 2).

26. The Respondents admitted that there were maximum age qualifications for the position. (Respondents' Answer: R. Ex. U; Tr. at 478, 530). The Respondents maintained a written policy setting forth its practice of not hiring applicants who will have reached or exceeded their thirty-third birthday at the time of their appointment. (CP. EX. # 54, 55; Tr. at 1209). See Finding of Fact No. 20. This policy was formally implemented by the Civil Service Commission by Resolution No. 2 passed on June 7, 1978. (CP. EX. #54; Tr. at 258-259). Prior to that time, Respondents had utilized an age 39 maximum age limit. (R. EX. EE: Tr. at 1139).

27. The application of this age discriminatory policy in rejecting Complainant Montz is demonstrated by the letter of September 21, 1989 from Brua to Montz. (CP.EX. 56). See Finding of Fact No. 24. Vaughn Brua sent Montz and other potential applicants the "Minimum Standards for Law Enforcement Officers' which stated the maximum age requirement. (CP. EX. .#54, 55; Tr. at 62-63, 260, 265). Brua admitted that he (1) personally talked with Montz and informed him about the maximum age requirement. (2) was the individual who determined that Montz was unqualified, and (3) the sole reason Montz was determined to be unqualified was his failure to meet the age qualification set forth in the Respondents' minimum standards. (CP. EX. # 55, 56, 85; R. EX. U; Tr. at 27778, 288-89, 324, 351, 481, 528, 531-32). See Finding of Fact No. 17.

28. Vaughn Brua also admitted that failure to meet the maximum age requirement was the reason for the rejection of Riley Fairchild. (CP. EX. #2; 85; R. EX. U; Tr. at 276-77, 319, 324, 494). Brua sent Fairchild a letter, dated September 14, 1989, which stated:

You have a very impressive resume and would appear to be the type of individual we are looking for. The Civil Service Commission has established minimum standards for prospective police officers, a copy is enclosed. Item "a" deals with a minimum age of 20 years old and maximum age of less than 33 years old. Your application states you will be 33 years of age on September 18. When an Appointment is made to the position, you will not meet the minimum standard.

I am sorry we will be unable to consider you and appreciate your interest.

(CP. EX. # 2; Tr. at 276). Notations on a list of persons requesting applications, which was compiled at Brua's direction, sate "Not qualified. Age," next to Montz' and Fairchild's names. (CP. EX. # 57; Tr. at 265-66).

Statements Reflecting an Age Bias:

29. In addition, there were statements by those involved in establishing and implementing the hiring standards for Respondents City of Estherville and Civil Service Commission which reflected an age bias. Civil Service Commission Chairman Barry Huntsinger, for example, stated that part of the reason for reducing the maximum age limit to age 33 was "trying to develop a younger department." (Tr. at 11 39, 1207). He agreed that the city's motivation and intent was to develop and hire younger people as police officers. (Tr. at 1207-08). He acknowledged that "the cap was really designed to develop a younger department because of this whole issue of knowing

that older officers do not perform as well as younger officers." (Tr. at 1160). He opined that "older officers do not do a lot of jobs aggressively like younger officers do.Younger officers will respond a little faster to emergencies better than older ones who get a little sluggish, a little slower, and a little harder to do those tasks." (Tr. at 1200).

30. Police Chief Farber stated that the age restriction "facilitates an officer doing his job here [in] that the younger officer is able to respond quicker. He has better responses and is better able to protect the public." (Tr. at 1017). He also acknowledged that the age restriction encourages a younger police force. (Tr. at 1017-18).

Respondents Did Not Establish Reliance on Any Reason Other Than Age in Their Rejection of Complainant Montz:

31. One of the affirmative defenses set forth by the Respondents on brief is that, even if there had been no age requirement, Complainant Montz would:

not have passed the initial screening, he would not have been allowed to compete for the position, he would not have been permitted to test for the position, he would never have been placed on the certified list by the Estherville Civil Service Commission and he would never have been considered for hire by Chief Farber because he did not have ILEA certification or a two year law degree in law enforcement or its equivalent.

Respondents' Brief at 7-8. For reasons discussed in the Conclusions of Law, it is important to ascertain whether Respondents established they actually relied on these additional reasons at the time of Complainant Montz' rejection on September 21, 1989.

Brua Alone Made the Final Decision that Montz Was Unqualified.

32. It is important to reiterate that Civil Service Commission Secretary Vaughn Brua alone made the final decision that Complainant Montz was unqualified. See Findings of Fact Nos. 17, 23-24, 27. (CP. EX. 85; Tr. at 270, 271-72, 275-76, 289-90). The only assistance he had in this process was that of Ms. Jody Pospisil, an employee in Mr. Brua's office, who assisted in review of the applications. Nonetheless, he personally reviewed all applications. (Tr. at 266, 275). If, in September of 1989, there had been an application with respect to which Brua was uncertain as to whether the minimum qualifications were met, he would have consulted either the Civil Service Commission or Chief Farber. There was no such application. (Tr. at 271-72).

33. Because neither Brua, nor any other witness, nor any document in the record supports Chairman Huntsinger's testimony that Brua was assisted by an unnamed member of the Civil Service Commission, this testimony is not credible. (Tr. at 1170, 1224). **Chairman Huntsinger played no role in making the decision that Montz was unqualified** because he did not participate in the selection process until the day the written, psychological, and agility tests were given. He could not even verify that he had ever seen Montz' application. (Tr. at 1224-25).

34. There is no evidence to indicate that Police Chief Farber reviewed Complainant Montz' application or participated in determining whether he was qualified once he applied. He described his role in the selection process as beginning when he obtained a certified list. (Tr. at

1074). He did not even know whether Vaughn Brua had disqualified Complainant Montz by letter within 24 hours of his application. (Tr. at 967). See Finding of Fact No. 23.

Brua Relied Only on Montz' Failure to Meet the Maximum Age Requirement in Disqualifying Him on September 21, 1989:

35. **The evidence in the record demonstrates that age was the sole criterion actually relied on by Respondents for rejecting Complainant Montz.** The only reason identified by Brua, in his letter of September 21, 1989 to Complainant Montz, for Montz' disqualification was his failure to meet the standard set forth in item "a" of the Minimum Standards for Police Officers which set forth the maximum age requirement. (CP. EX. 55, 56). See Findings of Fact Nos. 20, 23-24. **Brua admitted that failure to meet this age requirement was the minimum standard which was not met by Montz.** Age was the reason Montz was rejected. (Tr. at 278, 324).

36. In his testimony, Brua acknowledged that he went straight to the age requirement in rejecting Montz because they had discussed this requirement prior to his application. (Tr. at 532). This is consistent with his statements during the investigation to the effect that, after receiving Montz' application, he had only reviewed it sufficiently to determine that Montz had not met the age requirement. He did not discover that Montz did not have an ILEA certification or a two year associate degree in law enforcement until after he had rejected Montz. (R. EX. CC - Interview with Brua, Forsyth, and Farber at 9-10, 18, 20, 21).

37. The conclusion that age was the only reason for Montz' rejection is also supported by the answer to an interrogatory propounded to the Respondents which requested "all the reasons for which you claim the determination [that Complainant Montz was not qualified for the position of police officer] was made." Vaughn Brua's response was "To enforce the minimum qualifications for the position adopted by the Civil Service Commission. Mr. Montz exceeded the maximum age qualification." (CP. EX. # 85).

38. The conclusion that age was the only actual reason for Complainant Montz' rejection is also consistent with the notation on the Respondent Civil Service Commission's list of applicants which indicates Montz was disqualified due to his age. Although the same list has a notation for another applicant, Alvin Blackburn, indicating "Not Qualified. Assoc. 2 yrs. college," there is no such notation next to Montz' name. (CP. EX. 57).

39. The only evidence tending to indicate that reasons other than age were actually relied on by the Respondents at the time of Montz' rejection is the erratic testimony of Commission Chairperson Huntsinger. Huntsinger at first agreed that the Respondents' answers to interrogatories gave only age as the reason for the rejection of both Montz and Fairchild. (Tr. at 1184-85). He also denied that the use of the term "minimum qualifications," in the first sentence of Brua's response to this interrogatory, somehow indicated that the Respondent relied on reasons other than age for Complainant Montz' rejection. (CP. EX. # 85; Tr. at 1213). However, he later implied the opposite. (Tr. at 1214). His final position was that, since he did not write the response, he could not say what the reference to minimum standards meant. (Tr. at 1222).

40. Huntsinger initially admitted that neither the Respondents' rejection letter to Montz nor the rejection letter to Fairchild indicated any reason for their rejection other than age. (CP. EX. # 2, 56; Tr. at 1177-78). He acknowledged that the Respondents never communicated any reason to Montz for his rejection other than age, (Tr. at 1183), and that the reference to minimum standards in the rejection letter to Fairchild referred to the age requirement. (Tr. at 1186). Huntsinger subsequently asserted, however, that there were communications to Montz in which he was told that he was rejected due to failure to have ILEA certification or an Associate of the Arts degree in Law Enforcement. (Tr. at 1187-88). He also later implied that references to minimum standards in Brua's rejection letters to Montz and Fairchild, indicates that "minimum requirements" is a reason separate from age, i.e. "If you go by the letters, it is age and minimum requirements." (CP. EX. # 2, 56; Tr. at 1224).

41. Since Huntsinger actually played no part in the rejection of Complainant Montz, his inconsistent testimony on this issue is entitled to little weight and does not disturb the conclusion that the Respondents never actually relied on Complainant's failure to have either ILEA certification or an AA degree in their rejection of him. See Finding of Fact No. 17.

Respondents' Affirmative Defenses Based on Reliance On Advice of Counsel and Various Other Authorities in Establishing Its Maxim m Age Hiring Limit:

42. On brief, Respondents asserted that, in formulating and maintaining their maximum age hiring limit, they relied on the following authorities:

a. the advice and interpretations of law provided by their legal counsel;

b. the interpretations of Iowa Law Enforcement Academy (ILEA) regulations and Iowa law provided by Ben Yarrington, Director of the ILEA, to police chief Paul Farber;

c. Iowa Code section 411.6(l) (a);

d. Iowa Code section 400.8;

e. a 1980 opinion of the Iowa Attorney General;

f. analyses provided in federal court decisions;

g. the "silence" or failure of the Iowa Civil Rights Commission to respond to a January 16, 1986 letter from the City of Estherville, which answered an Iowa Civil Rights Commission inquiry on its maximum hiring limit;

h. the ILEA regulation at 501 IAC 2.3 (1988);

i. the "based on the nature of the occupation" or bona fide occupational qualification (BFOQ) exception set forth at Iowa Code subsections 601A.6(l)(a) and (c).

(Respondent's Brief at 33-36).

43. The following findings of fact on items "a" through "h" will largely focus on whether there is evidence supporting Respondents' assertions that they relied on these authorities in establishing and maintaining the maximum age hiring limit. The questions of whether reliance on these sources actually constitutes a valid defense under the facts of this case or whether the Respondents' legal interpretations based on these sources are correct will be discussed in the conclusions of law. More detailed findings of fact will be made concerning the bona fide occupational qualification (BFOQ) defense.

Reliance on Advice and Interpretations of Legal Counsel and of Ben Yarrington, Director of the ILEA:

43. The Respondents relied on the legal interpretations of City Attorney Gordon Forsyth in establishing the maximum hiring age limit in 1978 and in maintaining it since then. (Tr. at 785, 790, 795, P,20, 1156).

44. Although Police Chief Farber was familiar with ILEA Director Ben Yarrington and his opinion on the legality of maximum age hiring limits for police officers, there is no evidence in the record to support the proposition that this opinion was relied upon by Respondents to support the establishment or maintenance of a maximum age hiring limit. (Tr. at 100916). Chief Farber's knowledge of Yarrington's opinion could not have played a part in the establishment of the limit in 1978 as Farber was not employed by the City of Estherville until October of 1987. (Tr. at 96162).

45. Taken in context, ILEA Director Yarrington's opinion is not favorable to either the Respondents' position that it may defend its maximum age hiring limit by relying on his opinion or to their position that age is a bona fide occupational qualification for police officer. At best, it offers some support to the Respondent's position that the age limit is justified by the voluntary retirement pension law at Iowa Code section 411.6(l)(a):

[The ILEA has] eliminated, even though in the beginning we had maximum age limits of 60, in other words, there was a minimum of 21 and a maximum age of 60 in order to be hired as a peace officer. Not to continue, but to initially be
hired.

. . .

We lowered the minimum age to 18 when the age of majority law came out through the legislature a number of years back. **And we eliminated the maximum age** and inserted a required physical agility test. Feeling that, for example, if a man retires from the highway patrol at 55 and wants to be cop of a one-cop town, and can still pass the physical agility test, he can do that. And we do have some people come through here in their 50's. Usually they're from the very small towns.

. . .

And they pass the physical agility test before they were hired so we know when they come here, ... they can do the things they're required to do when they get here. But **there is no maximum hiring age specified by us,** but **if a town wants to set one they can, but if they're ever challenged, they're going to have to justify it, not us.**

. . .

Some of them, and I think legitimately so, will hire people not beyond a certain point because they can't fulfill and take advantage of a retirement system.

. . .

In other words, if you're starting on a job at 48 years of age, and retirement takes you to 55, you just haven't done much for yourself in earning that retirement.

. . .

It's usually the larger towns that are setting a maximum age. The smaller ones usually don't.

. . .

That's strictly up to them if they do it.

(R. EX. CC - Interview with Ben Yarrington at 11).

Reliance on Iowa Code Sections 400.8, 411.6(l)(a):

46. There is no question that Respondents relied on Iowa Code sections 400.8 and 411.6(l) (a) as legal authorities which, in their view, justified the establishment, and maintenance of the maximum hiring age limit. (R. EX. U, CC, 11, JJ; Tr. at 479, 529, 786, 78890, 795-96, 926-28, 1138- 41, 1157). See Finding of Fact No. 21. Because the retirement system established by Iowa Code section 411.6(l)(a) permits an officer to receive full retirement benefits at age 55 after 22 years of service, the Respondents subtracted 22 from 55 and used the result, 33, to establish a maximum hiring age whereby a candidate cannot have reached his thirty-third birthday at the time of his appointment. (Tr. at 529, 535, 927, 787, 1139). The Respondents were aware that section 411.6(l)(a) neither required police officers to retire at age 55 nor prohibited them from retiring or resigning before that age. (Tr. at 917-18, 928, 1203). They were also aware that there was not any requirement that only permitted a police officer to be hired if he would be fully vested in the retirement system at age 55. (Tr. at 928). Respondents also understood that the Iowa legislature did not intend to encourage police officers to retire at age 55. The age was a target date by which police officers could be fully vested in their pension. (Tr. at 1206).

Reliance on a 1980 Opinion of the Iowa Attorney General and on Federal Court Decisions:

47. In the course of relying on the opinions of the City Attorney, the Civil Service Commission relied on his interpretations of a 1980 opinion of the Iowa Attorney General and of Federal court decisions. (R. EX. G G; Tr. at 793-95, 799, 801, 820, 1144, 1156).

Reliance on the "Silence" or Failure of the Iowa Civil Rights Commission to Respond to a January 16,1986 Letter from the City of Estherville, Which Answered an Iowa Civil Rights Commission Inquiry on its Maximum Hiring Limit;

48. In either December of 1985 or early January of 1986, Kevin Pokorny, a Training Officer employed in the Iowa Civil Rights Commission's educational resources unit, wrote the City of Estherville a letter asking whether the Respondent had a maximum age limitation for entry level police positions and what the maximum age was based upon. (R. EX. QQ; Tr. at 802). Mr. Pokorny's letter was not entered into evidence. There is no evidence in the record to indicate the underlying reason for Mr.Pokorny's letter. There is no evidence to indicate that the letter was part of an investigation of any complaint.

49. City Attorney Gordon Forsyth composed a response, consisting of a letter dated January l6, 1986. (R. EX. KK; Tr. at 802). The letter indicated that, based on Iowa Code section 400.8, the Civil Service Commission believed it had the legal authority to set maximum age hiring limits for police officer positions. It also invited Mr. Pokorny to contact Mr. Forsyth if he had any further questions on this matter. (R. EX. KK). When Forsyth received no response from Mr. Pokorny or any other Commission representative, he and the Civil Service Commission chose to assume that this failure to respond signified the Iowa Civil Rights Commission's agreement with or acquiescence in Respondents' position. (Tr. at 803, 1151). They relied on this assumption in maintaining their maximum age hiring requirement. (Tr. at 803, 1151).

50. Forsyth's letter was addressed to "Iowa Civil Rights Commission, 2nd Floor, 211 East Maple Street, Des Moines, IA 50319." Official notice is taken that this has been the correct address of the Commission since December of 1984. See 1985 Iowa Civil Rights Commission Annual Report at 1. Fairness to the parties does not require that they be given the opportunity to contest this fact.

51. There is no evidence in 'the record to clearly show that: (1) the letter was enclosed in an envelope or wrapper or otherwise prepared for transmission through the mail; (2) the package containing the letter was properly addressed; or (3) postage was prepaid. There is also not sufficient evidence in the record to clearly show that this letter was deposited in the mail for transmission. At most, there is the conclusory testimony of Mr. Forsyth that this letter was mailed from his office. (Tr. at 802). Therefore, no presumption has been established to the effect that the letter was delivered to Mr. Pokorny or to the Iowa Civil Rights Commission. See Conclusions of Law 64-66.

52. Since it has not been established that the letter was delivered to either Mr. Pokorny or any other representative of the Iowa Civil Rights Commission, it has not been established that the statements contained therein were made in the presence of Mr. Pokorny or any such representative or read by them in the presence of others. There is also no evidence that the statements made in the letter, which are essentially a legal argument concerning why

Respondents believe they are entitled to set minimum and maximum age limits, are the kind of statements which, if untrue, would ordinarily call for a written denial. Under these circumstances, and for reasons stated in the Conclusions of Law, Forsyth's letter does not and cannot constitute an admission by silence of the Iowa Civil Rights Commission whereby its failure to respond reflects agreement with or acquiescence in the statements of the Respondents' legal position set forth therein.

53. Even if the Iowa Civil Rights Commission had responded to Forsyth's letter and informed him that the Respondents' maximum age hiring limit was in violation of the Act, he would have still advised the Respondents to continue the limitation as it would still be his legal interpretation that the limit was legal. (Tr. at 31 0).

54. At the time of the hearing, City Attorney Forsyth was not familiar with the phrase "declaratory ruling" as it is used in administrative law. There is no evidence in the record which would indicate any reason which would have precluded a request by Respondents City of Estherville and Civil Service Commission for a declaratory ruling from the Iowa Civil Rights Commission concerning whether a maximum age hiring limit would violate the Iowa Civil Rights Act.

Reliance on the ILEA Regulation at 501 IAC2.3(1988):

55. Although the ILEA regulations were admitted into evidence through the testimony of Sheriff Lamack, and there is evidence that Ben Yarrington was aware of this particular regulation, there is no evidence in the record to support the proposition that anyone involved with the Respondents actually relied on this regulation in formulating or maintaining the Maximum age hiring limit. (R. EX. DD; R. EX. CC interview with Ben Yarrington at 6.) Nonetheless, this regulation will be discussed in the Conclusions of Law.

Reliance on the "Based on the Nature of the Occupation" or Bona Fide Occupational Qualification(BFOQ) Exception. Set Forth at Iowa Code Subsections 601A.6(l)(a) and (c):

56. A major emphasis of the Respondents' defense is that the maximum age qualification is "based on the nature of the occupation" or is a "bona fide occupational qualification" (BFOQ). It is more likely than not, however, that, in comparison to the other factors previously shown to have been relied upon, the BFOQ exception per se had only a peripheral role in the establishment and maintenance of the requirement that a candidate for a police officer position "has not reached his or her thirty-third birthday at the time of his or her appointment" . (CP. EX. # 55).

57. The earliest indication of an interest in reducing the maximum age hiring limit was former police chief Robert Seylar's letter of March 31, 1975 to the Civil Service Commission requesting that the age be lowered from 39 to 33. (R. EX. EE). Gordon Forsyth, who has been city attorney since 1973, noted that this age was "exactly that contained in the retirement act [i.e. Chapter 411]." (Tr. at 784, 813- 14). When, in 1986, Forsyth provided legal authority to Kevin Pokorny for the City's maximum age hiring limit, he relied solely on Iowa Code section 400.8 which he interpreted as authorizing the establishment of maximum age limits. The BFOQ exception is not mentioned. (R. EX. KK). At the time of Vaughn Brua's conversation with Complainant Montz,

Brua mentioned only Chapter 4ll as justification for the age limit. See Finding of Fact No. 21. When he explained the .City's rationale for enacting and retaining the age limit during the course of the investigation, Forsyth repeatedly emphasized the provisions of Chapters 400 and 411 and (for the period after its issuance) a 1980 attorney general's opinion. In that same interview, he repeatedly denied that establishment of the age limit was linked to ability to do the job, a position diametrically opposed to the BFOQ defense:

You're doing it for the pension. Not simply because you think people who are older couldn't do the job.

. . .

We gotta comply with the Statute, which still says to this day, we gotta set a minimum and maximum age and the only just criteria I can see, isn't to fix an age based on the job but to fix an age based upon legislative intent to give them a full pension right at 55 at 22 years of service.

. . .

Very specific in the Code. And that is not tied to their ability to do the job, it's based upon the fact that the legislature says, "You can retire at 55 if you have 22 years benefits. . ."

. . .

But the one we set was the one we felt would not be discriminatory because it was tied not to their ability to do the job for their age specifically, but tied to the provision dealing with police pension and retirement provisions.

. . .

[T]he age requirement that we fixed was tied not to the idea that if you're over 33 you can't do the job.

(R. EX. CC-Interview with Brua, Forsyth and Farber at 5, 6, 7, 25, 26; Tr. at 822).

58. At hearing, Forsyth reaffirmed that:

[T] he..... maximum age limit that's justified is tied to police pension benefits. That is not tied to their ability to do the job. What I'm referring to there is simply the fact that the age of...33..... was not put in there because we didn't feel someone 34 couldn't do the job. It was put in there because--the specific age of 33, because of the 22-year, 55-age requirement of the retirement--Police Pension Retirement Act. That's all it is referring to in that.

(Tr. at 836).

BFOQ: First Inquiry: Whether Job Requirements for the Position of Police Officer, Which Respondents Rely On to Justify Their Age Criteria, Are Essential to the Central Mission of the Police Department:

59. The job requirements relied upon by Respondents as justifying their maximum age hiring standard for patrol officers are the abilities to perform the following tasks: run to aid a victim; administer cardiopulmonary resuscitation (CPR); lift and carry persons either on backboards or stretchers or without them; to pursue, physically fight and/or restrain, and apprehend criminal suspects or persons under the influence of drugs or alcohol. (Tr. at 558-60, 847, 99597, 999-1002, 1006-007, 1017-19). All of these functions are essential to the central mission of the Estherville Police Department which is to enforce the law and protect the safety of the public. (Tr. at 562, 845, 847, 854, 997, 999,1007,1017,1019,1022).

BFOQ: Second Inquiry: Whether Respondents Had **A** Substantial Basis In Fact for Believing That All or Substantially All Persons At the Age of 33 or Over Cannot Perform Safely and Efficiently the Duties of the Police Officer Position:

60. Respondents have not proven a substantial factual basis for believing that all or substantially all persons at the age of 33 or over cannot perform safely and efficiently the duties of the Estherville police officer position. At no point did anyone testify or offer evidence indicating that such was the case. The preponderance of the evidence, as set forth below, is to the contrary.

61. As admitted by Dr. Robert S. Hranac, Respondents' medical expert, there is no known, sound, medically scientific reason to believe that every applicant who has reached his thirty-third birthday is unfit to be a police officer. The same would be true for the ages of 36, 40, 44, and 46. (Tr. at 596). As an example of the physical demands placed on police officers, Dr. Hranac testified about a man who was in a alcoholic rage and had to be subdued by three law enforcement officers. (Tr. at 558-59). One of the three officers was 38 or 39 years old. The other two were in their mid to late twenties. (Tr. at 561).

62. As stated by Dr. Paul Muchinsky, an industrial psychologist who testified on behalf of Respondents, as a matter of industrial psychology (which is the application of the scientific principles of psychology to the world of work), a chronological age limit of 35 or younger is not essential to the patrolman job on an individual by individual basis. The same is true for the ages of 40, 50, and 55. (Tr. at 840, 901-903). He denied that it was the burden of his testimony that there is a single age beyond which no one should be allowed to commence a career as a police officer. (Tr. at 890).

63. As acknowledged by Police Chief Farber, the Estherville police department does not terminate police officers when they reach the age of 33 on the basis that persons age 33 or over cannot do the job. They are, in fact, retained on the job past that age. (Tr. at 1111). It cannot be said that all persons of age 33 or over are incapable of performing the duties of police officer or of having an appropriate physical response as a policeman. (Tr. at 1109,1112). Persons of 43 years of age or over are capable of performing the tasks of police officer in Estherville. The same is true for persons of 50 or 54 if they are physically fit and mentally sound. Persons of those ages will differ from one another in their physical fitness due to their lifestyle and exercise. (Tr. at

1084, 1113-14). For example, Chief Farber could, as a 43 year old man, have better physical responses than suspects who smoke, drink and don't exercise even though they may be 20 years old or younger. (Tr. at 1109).

64. The establishment of the maximum age hiring limit was not tied to ability to do the job. See Findings of Facts Nos. 57-58.

65. As confirmed by the testimony of Respondents' witness, Emmet County Sheriff Larry Lamack, there is no rule at the Emmett County Sheriff's Department that required Deputy Sheriffs be under the age of 33 when hired. (Tr. at 704-05). Although deputies' duties were different than those of a police officer, they are at least as important and physically demanding as the duties required of police officers. (Tr. at 707-08).

66. The opinion of Dr. Richard Moe, Complainant's medical expert, supports the conclusion that excluding individuals who have reached their thirty-third birthday "doesn't make good sense simply because of the wide, wide, wide variation in individuals at any given age that progressively widens as we get older." (Tr. at 366). A person ought to be able to perform the rigorous activities required by a police officer up to end of the normal occupational life span, i.e. up to age 65. (Tr. at 365-66, 423).

Dr. Moe relied on an article, which was admitted into evidence, from the authoritative medical journal Medicine and Science in Sports and Exercise, (Tr. at 437-38), a part of which is adopted as a Finding of Fact below.

67.

There exists ample evidence that older professionals in physically demanding jobs can successfully execute their duties. It follows that, as a group, older individuals who are otherwise healthy can modify their life styles,with particular emphasis given to physical activity, to develop and maintain the necessary physiological profile to successfully execute the duties of physically demanding jobs.

. . .

[T]hrough physical activity, avoidance of excesses, and controlling stress and tension, a conservative estimate of the upper limit for age on the physically demanding job would be 70. [T]his is a conservative estimate and the true upper limit may be higher. [E]mployers of older individuals, whatever their ages, [should] not judge the abilities of those individuals on the basis of age but rather on the basis of criterion job performance and physiological profile.

Davis & Dotson, Job Performance Testing: An Alternative to Age Discrimination, 19 Medicine and Science in Sports and Exercise, No. 2, pp. 179, 183 (1987). (CP. EX. # 78). The professional "physically demanding job[s]" referred to above include police officers and firefighters. Id. at 180-81.

BFOQ: Third Inquiry: Whether Respondents Have Proven That It Is Highly Impractical to Select Qualified Candidates Over the Age of 33 Through Individual Testing.

68. Respondents have not proven that it is highly impractical to select qualified candidates over the age of 33 through individual testing. It must be borne in mind that the "based on the nature of the occupation" or BFOQ defense must concern qualifications that affect an employee's ability to do the job. See Conclusion of Law No. 81. It is possible to discern two arguments being made by Respondents with respect to age and the job requirements for which Respondents seek to use age as a surrogate. (These requirements were set forth in Finding of Fact No. 59.) First, that there are individuals over the age of 33 who are unable to meet such requirements due to the general effects of aging. Second, that there is an increased risk that individuals over the age of 40 would sustain a heart attack or other disability while attempting to perform such requirements. For Respondents' to establish a Bona Fide Occupational Qualification, they must also prove that it would be highly impractical for such inability or risk to be adequately detected or controlled through testing. See Conclusion of Law No. 102.

Respondents Have Not Proven That It Would Be Highly Impractical To Adequately Detect, Through Testing, Individuals Over the Age of 33 Who Are Unable, Due to the General Effects of Aging, to Meet the Requirements. For Which the Respondents Seek to Use Age as a Surrogate:

69. There are two flaws in the proposition that it would be highly impractical to adequately detect, through testing, individuals over the age of 33 who are unable, due to the general effects of aging, to meet the requirements for which the Respondents seek to use age as a surrogate. First, many of the declines in performance thought to be due to aging are actually due to other causes. Second, it is possible to adequately test and determine which individuals over the age of 33 are unable to perform the job.

70. Although there are general deleterious effects of aging on the human body, the physical impact of aging will vary widely from person to person. (R. EX. MM; Tr. at 443, 549). See Findings of Fact Nos. 63, 66. Official notice is taken of the following empirical facts which are emphasized in the legislative history of the Age Discrimination in Employment Act (and which are thus capable of certain verification): "[T]he process of psychological and physiological degeneration caused by aging varies with each individual. 'The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age.'" Western Air Lines, Inc. v. Criswell, 472 U.S. 400,105 S. Ct. 2743,86 L.Ed. 2d 321, 330 & n. 11 (1985)(citing and quoting Report of the Secretary of Labor, the Older American Worker: Age Discrimination in Employment 9 (1965); and citing EEOC, Legislative History of the Age Discrimination in Employment Act 26 (1981). S. Rep. No. 95-493, p. 2 (1977), Legislative History 435). Fairness to the parties does not require that they be given an opportunity to contest these facts.

71. These variances among individuals grow wider as people age. Davis & Dotson, Job Performance Testing: An Alternative to Age Discrimination at 181 (hereinafter referred to as "Davis" or "Davis & Dotson"). (CP. EX. 78). One way of expressing the concept that an individual's physical performance may vary from what would be expected given his or her chronological age is to refer to an individual's "functional age." Id. at 179. An individual's

functional age relates to the amount of work an individual can perform, whether measured through strength, endurance or another factor, and comparing that to other people. (Tr. at 394). Therefore, an individual with the chronological age of 40 could be referred to as having a functional age of 25 given that he had the physical ability to perform the work expected of an individual with a chronological age of 25. (Tr. at 852). One's functional age may be quite different from one's chronological age. (Tr. at 445).

72. The evidence demonstrates that decreases in individual muscular strength, reaction time, endurance and other deterioration once thought to be due to aging have been shown, through relatively recent research, to actually result from disuse of the body, i.e. a lack of physical activity. (Tr. at 370-71, 377). In fact, muscular strength "shows no significant change over the employment years of adult males." Davis & Dotson at 181. (CP. EX. # 78). Studies have shown that there are no significant differences in the mean reaction times of older males (average age o" 50) and younger males (average age of 20). Id. Eve individuals who are not physically active "can maintain relative muscular endurance up to age 65." lo Although the greater weight of the evidence does not support Respondents' thesis that declines in these areas of physical ability are primarily due to the general effects of aging, these areas are identified by both the Davis article and by Respondents as being pertinent to the performance of the requirements set forth in Finding of Fact No. 59. Id. (Tr. at 1017, 1083, 1108=09, 1155, 1160, 1200, i2-O2). Furthermore, whatever decreases are attributable to aging are not sufficient to disqualify anyone in the normal occupational life span (to age 65) from police work. (Tr. at 366, 371).

73. Evidence was introduced on two alternative forms of testing which could serve as substitutes for age discrimination in hiring and retention. One alternative is to individually test applicants and incumbents in order to ascertain their functional age. (R. EX. MM; Tr. at 404, 409, 860-61). Another alternative was to develop testing criteria which would accurately measure intrinsic individual attributes .related to the job, such as specific physical abilities required to do the job, and thereby test both applicants and incumbents to measure their ability to perform the job. (R. EX. MM; CP. EX. 78; Tr. at 876). Davis & Dotson at 180. Under each alternative, tests are initially administered to applicants to determine if they are qualified and periodically administered to police officers on the force to ascertain their continuing ability to perform the work. (R. EX. MM; Tr. at 409, 860). There is a relationship between the two in the sense that both concepts recognize that the functional ability of an applicant may not be accurately reflected solely by reliance on his or her age. Davis & Dotson at 179. (R. EX. MM). The first alternative, however, utilizes functional age as the qualification for hiring or retention, i.e. one must be shown to be able to perform at a particular functional age level. (Tr. at 404, 861). The second alternative utilizes criteria specifically related to job performance as the qualification, i.e. one must be shown to be able to meet the specified criteria. Davis & Dotson at 180.

74. The first alternative was attacked by Dr. Muchinsky's testimony in which he relied on a 1984 article, introduced by the Respondent as Exhibit MM, from the journal Experimental Aging Research.Avolio, Alternatives to Age for Assessing Occupational Performance Capacity, 10 Experimental Aging Research No. 2 pp. 101-05 (1984)(hereinafter and previously referred to as R. EX. MM). (Tr. at 867-68). One difficulty with determining an individual's functional age is that there is no professionally agreed on measure for determining functional age. (Tr. at 863). One might, for example, find that an individual has the vision of a 25 year old, the lung capacity

of a 38 year old, and the physical strength of a 35 year old. While a person's functional age could be estimated by averaging these values, the average can be grossly deceptive due to variability among components. (R. EX. MM; Tr. at 863-64). Another problem is the failure to empirically validate functional age measures, i.e. failure to show that they are predictive of job performance. (R. EX. MM).

75. As noted above, the second alternative to age discrimination is "to develop testing criteria which would accurately measure intrinsic individual attributes related to the job, such as specific physical abilities required to do the job, and thereby test both applicants and incumbents to measure their ability to perform the job." See Finding of Fact No. 73. This alternative was suggested in the Avolio article, (R. EX. MM), in 1984. "In our estimation, such reliance on [functional age has resulted in the neglect of] appropriate assessment strategy-designing measures that assess 'intrinsic' attributes directly related to job performance." [T]he concept of functional level warrants some attention, but only if it is directly related to job performance." (R. EX. MM at 101).

76. Dr. Muchinsky agreed that "what the authors (of Respondents' Exhibit MM) are saying . . . is functional age has not been a useful approach. Therefore it is possible that one could look for intrinsic individual attributes to be used in the assessment of individuals' capacity to meet job performance criteria." Dr. Muchinsky agreed that the authors considered this approach to be preferable to either a functional age or chronological age surrogate. (Tr. at 876).

77. This approach is essentially what was followed in the 1987 Davis study relied on by Dr. Moe. Davis & Dotson at 180. As part of their test development, a criterion-related validity study, conducted in accordance with the federal Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 et. seq., was performed to ensure that the tests developed and administered to law enforcement officers were job related tests. Id. As part of this validity study, a complete job analysis was done for the position of law enforcement officer. Id. This "entailed interviews of incumbents, observation of on-the-job behaviors, and in some instances, survey tools designed to elicit additional occupational information." Id. This analysis utilized what Professor Muchinsky characterized as the work oriented approach in that it focused on tasks performed on the job. Id. (Tr. at 880).

78. Official notice is taken of the facts set forth in those sections of the federal Uniform Guidelines on Employee Selection Procedures which are set forth below. Fairness to the parties does not require that they be giver the opportunity to contest these facts:
1. A criterion related validity study consists of "empirical data demonstrating that the selection procedure [i.e. test] is predictive of or significantly correlated with important elements of job performance." 29 C.F.R. §§ 1607.5.B; 1607.16.F.

2. In order to meet the standards set by the Guidelines, it was necessary for Dotson and Davis to demonstrate that the relationship between the selection procedure scores and criterion measures of job performance was statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance." 29 C.F.R. § 1607.14.B (3)(4). [Note: Dotson and Davis refer to this as a "0.95 confidence limit" in their article at 180.]

3. A job analysis is defined as "a detailed statement of work behaviors and other information relevant to the job." 29 C.F.R. § 1607.16.K. Required documentation for a job analysis conducted with reference to a criterion related validity study includes:

A description of the procedure used to analyze the job . . . or to review the job information should be provided. (Essential). Where a review of job information results in criteria which may be used without a full job analysis, the basis for the selection of these criteria should be provided. (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s) and measures of their criticality or importance should be provided. (Essential). The report should describe the basis on which the behaviors) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors. (Essential).

29 C.F.R. § 1607.15.B (3). Similarly complex requirements are set forth for documentation of job analyses conducted for content and construct validity studies. 29 C.F.R. § 1607.15.C (3); 1607.15.D (4).

79. The tests developed by Davis and Dotson included, for applicants:

(a) such tests as: (a) "1.5 mile run, pull-ups, situps, a one-repetition-of-maximum bench press, and standing long jump; and (b) estimated body composition [percentage of fat] via skin fold caliper measurements." Davis & Dotson at 180.

80. Tests for incumbents included criterion tasks such as: "(a) lug wrench torque test; (b) body drag for 15.24 m[eters]; (c) full-size sedan push for 15.24 m; and (d) a foot pursuit course simulating a chase of a fleeing felon." Id. A 1.5 mile run was also included. Id. at 181. Over eighty percent of officers responding to a survey on these tests for incumbents agreed "that the test battery was a fair and accurate representation of the physical performance requirements of law enforcement." Id. at 180-81.

81. The tests developed by Davis and Dotson, as well as other physical tests, may be utilized to test for strength, flexibility and endurance required to perform the tasks listed in Finding of Fact No. 59. (CP. EX. # 78; Tr.. at 366-69, 382-84, 392-93). Other police tests which measure job related criteria include handgrip strength, bent-knee situps, obstacle courses, agility runs, seated stretch test, 100 pound drag-lift, automobile rescue and stretcher simulation tests . (CP. EX. 78; Tr. at 467-71). Complainant's Exhibit # 78 includes, in addition to the Davis and Dotson article, a medical journal article, and excerpts from a consultant's report, setting forth in detail the tests used by various police departments and their relatedness to the tasks set forth in Finding of Fact No. 59. See Klinzing, The Physical Fitness Status of Police Officers, 20 Journal of Sports Medicine 29196 (1980)(hereinafter referred to as "Klinzing"); Foss, Final Report: Recommended Job Related Physical Performance Tests for the State Police Trooper Class (Michigan) (1975)(hereinafter referred to as "Foss").

82. The preponderance of evidence in the record does not support the proposition that it is highly impractical to select qualified candidates over the age of 33 through the use of these tests. Indeed, the preponderance of the evidence demonstrates that, due to the general sedentary nature of police work, police work in itself will be inadequate to maintain the physical fitness necessary to perform the occasional strenuous physical demands required by the job. Davis & Dotson at 182-83; Klinzing at 29495; Foss at 7. The public safety will be best served not by age discrimination in hiring, but by a program of initial applicant testing, periodic incumbent testing, and physical fitness training for incumbent police officers. Davis & Dotson at 182-84; Klinzing at 294-95.

83. It should be noted that there is no credible evidence to suggest that the Respondents' maximum age hiring limitation has ever been subjected to the kind of analysis and validation studies which the police testing programs set forth above have been subjected to. Dr. Muchinsky neither conducted any such study or job analysis nor knew of anyone who did. (Tr. at 880-81). Commission Chairman Huntzinger's testimony, to the effect that a job analysis (which would be one step in a validation study under the Uniform Guidelines) was conducted of the police position based on the Civil Service Commission's own experience and knowledge and the input of the administration of the department, is not believable for two reasons. First, Huntzinger testified that this job analysis was a totally verbal, unwritten, and undocumented analysis. (Tr. at 1199-1200). No job analysis worthy of the name would be totally undocumented. See Findings of Fact Nos. 77-78. (Tr. at 880-81). Second, City Attorney Gordon Forsyth, who would certainly be expected to know of any such job analysis, was totally unaware of any formal job analysis of the police officer position by anyone during his entire 18 year term as City Attorney. (Tr. at 823).

Respondents Have Proven Neither An Increased Risk That Individuals Between the Ages of 33 and 40 Would Sustain Heart Disease or A Heart Attack Nor That It Would Be Highly Impractical to Detect, Assess, and Control Any Such Increased Risk After the Age of 40 Through Individual Testing:

84. The argument of Respondents (to the extent it is concerned with ability to do the job) is essentially that, as people age past 40, heart and other chronic diseases begin to make their appearance. There is, therefore, an increased risk that police officers past 40 will develop these diseases, particularly, heart disease. It is impossible to predict through any single medical test or even the best physical examination which officers will contract heart disease or which will have heart attacks. Aging will also cause a reduction in cardiac output, lung capacity and aerobic capacity. Police officers may need to rely on a sudden burst of aerobic capacity when performing such duties as rescuing citizens or combatting criminals. This combination of an increased risk of heart disease and of lowered capacity may result in a heart attack or other disability which would prevent an officer from carrying out these duties and would thereby endanger the public safety. Since the only acceptable risk of such an event occurring is zero, ("the absolute public safety factor") the Respondents' mandatory hiring age limit is justified. Respondents' Post Trial Brief at 910, 22-25.

85. There are three errors in Respondents' argument. First, Respondents have not established an increased risk of heart disease, heart attack or other chronic disease for individuals between the ages of 33 and 40. Second, Respondents have not proven that the age 33 hiring limit actually

effectuates the goal of reducing the risk of heart disease, heart attack, or other chronic illness on the Estherville police force. Third, Respondents have not established that the increased risk of heart disease, heart attack, or other chronic disease cannot be reliably and practically detected, assessed and controlled through individual testing.

86. In order to ascertain whether the Respondents have established a BFOQ defense, it is necessary to determine (1) whether there is an increased risk of heart disease, heart attack, or other chronic disease among those excluded by the maximum age hiring limit as compared to those not excluded, and, if so, (2) whether it is highly impractical for this increased risk of heart disease, heart attack, or other chronic disease to be detected or controlled through individual testing. See Conclusions of Law Nos. 93,102-03.

87. In order to ascertain whether it is highly impractical to detect, assess and control this risk through testing, it is necessary for the Respondents to show that their practices (the maximum age hiring limit and retention of officers beyond this age) either control or reduce the risk of heart disease, heart attack, or other chronic disease in the police force. Therefore, it is necessary to determine (A) what is the incidence or probability of heart diseases, heart attack or other chronic disease resulting in the police force if the maximum age hiring limit is retained without any collateral changes; and (B) what is the incidence or probability of these illnesses if the maximum age hiring limit is eliminated and no other changes are made. If Respondents have proven that the incidence or probability of these illnesses presented in (B) is greater than the extent of the risk presented in (A), then Respondents must also prove that there is no practical, reliable way to detect, assess, and control the risk of heart disease or other chronic disease through testing which is at least as effective as the maximum age hiring limit. See Conclusions of Law Nos. 93,102-03.

88. There is no evidence in the record demonstrating any increased risk for heart disease, heart attack or other chronic disease for persons between the maximum hiring cutoff age of 33 and age 40. There is no evidence of the incidence of heart disease, heart attack or other chronic disease at any point within or throughout this age range. Nor is there evidence of the percentages of those persons within that age range who have heart disease which is (a) detectable through the presence of symptoms, (b) which is asymptomatic and is detectable through testing, or (c) which is undetectable. Thus, insofar as the maximum age hiring limit excludes candidates aged from 33 to 40, a group for which there is no evidence that its members possess the trait of an increased risk of heart disease, heart attack or other chronic disease, Respondents have not established any BFOQ defense based on such increased risk in these candidates.

89. It is established that "[f]or most men, chronic diseases [including heart disease] start appearing in and after the fourth decade of life, meaning between 40 and 50 they start showing up."(Tr.at 551). However, because of the paucity of statistical evidence in the record on this issue, it is impossible to make the necessary comparisons of the incidence or probability of heart disease, heart attack, or other chronic disease in the police force with and without the maximum age hiring limit. There is no evidence in the record of when such disease appears in females. There is no evidence in the record of the incidence of heart disease or other chronic disease in the general population at any point within or throughout the age range from 40 to 60.

90. It has been shown that fifty percent of all people who die past age 60 do have evidence of ischemic heart disease. (Tr. at 550). This population, however, undoubtedly includes many people older than the endpoint for the normal occupational life span (and, in Iowa, the mandatory retirement age) for police officers of age 65. See Finding of Fact No. 72. This statistic also provides no guidance as to what proportion of this population had heart disease prior to age 65.

91. Nor is there evidence in the record of the percentages of those persons, within the age range of 40 to 65, who have heart disease or other chronic disease which is (a) detectable through the presence of symptoms, (b) which is asymptomatic and is detectable through testing, or (c) which is undetectable.

92. Although it is undisputed that "law enforcement personnel have a higher than expected incidence of heart disease and resulting mortality," Klinzing at 201, the record reflects neither the incidence of heart disease and resulting mortality among police officers nor the incidence of heart disease and resulting mortality among the general population in the age range which would encompass the normal occupational life span of a police officer,

93. What evidence there is suggests that the Respondents' hiring and retention policies, which prohibit the hiring of candidates of age 33 or over, while permitting police officers to continue to work not only to age 55, but to the mandatory retirement age of 65, cannot yield the minimum risk sought by Respondents:

One issue that has been raised regarding Bona Fide Occupational Qualification for any specific age is the incidence and probability of cardiovascular disease and the occurrence a morbid event in that specific particular age group. To establish a nearly absolute minimum risk, insuring that no fire fighter or police officer will succumb to a heart attack, a mandatory **retirement** age of 35 would be required. On the basis of data reported by the National Fire Protection Agency for deaths in the fire service, **no other age restriction would guarantee that any particular age group or classification is immune from this disease.**

Davis & Dotson at 183. See Findings of Fact Nos. 26, 46, 63.

94. The failure of the maximum age hiring limit to reduce or control the risk of heart disease or other chronic disease in the Estherville police force is demonstrated by Respondent's experience with respect to such disabilities. In the ten year period from May 1, 1981 to May 1, 1991, five police officers had to take disability retirement, while zero officers retired under the voluntary retirement provisions of Iowa Code 411.6(l)(a), i.e. 22 years of service and attainment of age 55. (R. EX. K; L; Tr. at 499, 501). No officer has taken regular retirement since July 6, 1979. (R. EX. K). By way of comparison, during the same ten year period, the remaining departments within the city had four individuals who retired early or terminated their employment due to disability,while thirteen employees took regular retirement. (R. EX. K; Tr. at 502).

95. Four out of the five police officers who took disability retirement were under the age of 33 at time of hire. (R. EX. L). Four out of these five officers were disabled due to lung or heart disabilities. (Tr. at 929, 931, 934, 935, 936). Three of these four were under 33 at time of hire. One was 35. (Tr. at 930, 933, 934, 936, 937). The following chart shows the age of police

officers at hire, their age at time of disability retirement, and the nature of their disability for this ten year period:

Officer Number	Age at Hire	Age at Disability Retirement	Nature of Disability
#1	35	51	Heart
#2	26	53	Heart
#3	26	53	Heart
#4	31	51	Hearing
#5	29	42	Lung

(R. EX. K, L, N, 0, P, Q, R, T; Tr. at 929-31, 933-37).

96. On August 26, 1989, over ten years after the initiation of the Respondents' maximum age hiring limit, and within a week after the last of. the five disability retirements listed above had taken place, the Civil Service Commission noted that "the incidence [of Estherville Policemen being retired under disability benefits] appears higher than normal." (R. EX. L, S).

97. There is no evidence in the record which would support a conclusion that any increased risk of heart disease which may exist for male police officers past the age of 40 will not equally affect male police officers in that age range who were initially hired prior to the age of 33. Therefore, it would appear that whatever threat to the public safety is presented by this increased risk of heart or other chronic disease in these officers will not be diminished by Respondents' maximum hiring age limit. A police officer hired before the age of 33 may choose to not retire until sometime between the date he is eligible to receive his fully vested retirement pension (which could not be earlier than age 55 for any police officer) and the mandatory retirement age of 65. Therefore, officers who make this choice will be serving with the increased risk of heart or other chronic disease for a period of 15 to 25 years. Whatever threat is presented to the public safety by this increased risk will also be present throughout this period. The Respondents' maximum age hiring limit will have no effect on the increased risk of heart disease or other chronic disease among these officers or on the concomitant threat to public safety.

98. At the same time the Civil Service Commission recognized that the Estherville police force had a high incidence of disability retirements, it also unanimously voted to require medical examinations of police officer candidates prior to appointment and periodic physical examinations of incumbent police officers by doctors designated by the City. (R. EX. S). Although police candidates are examined, the decision to have periodic physical examinations of police officers has not been implemented. (Tr. at 547,1082). The present policies and practices of the City of Estherville provide for no monitoring or testing of the health or fitness of incumbent police officers. The Respondents have no fitness program and rely on no means of detecting health or fitness problems which may affect police officers and the public safety other than the visual observations of the police chief. (Tr. at 1082, 1114-15).

99. Articles in refereed authoritative medical journals which have advocated individual testing and fitness programs have recognized the same public safety concerns which are offered as a rationale by Respondents for the maximum age hiring limit. Their advocacy of testing is based on their conclusion that these concerns are best met through testing. Davis & Dotson at 183-84. Klinzing at 291.

100.

Citizen safety may at times depend upon the physical fitness of police officers. Not only is the citizen better protected by well-conditioned police officers, but the officer's personal well-being will often depend upon his physical capabilities. A trend toward reduced sick and disability time has been shown when police officers are physically fit. When an officer pursues a suspect or runs to assist a victim, the ability to successfully accomplish this task demands adequate cardiorespiratory endurance, speed and agility. The stress placed upon the cardiovascular and respiratory systems can be severe.

Klinzing at 291.

102.

Evidence suggest that the incidence of heart disease in public safety personnel is a mirror of the population-that they serve. [F]ire and police personnel possess a number of the readily identifiable risk factors that predispose one to accelerated cardiovascular disease.

Cigarette smoking ... was claimed as a habit of the majority of fire fighters, while in the population at large, less than half of adult men smoke. Risk factors have been isolated that**accurately predict the likelihood** of developing a disease. Effort should be directed to controlling these risk factors through lifestyle intervention programs and adequate screening.

If municipalities were truly interested in the issue of safety, programs of these types would have long since been employed. When the issue of Bona Fide Occupational Qualification is raised as a defense, numerous test data are displayed to show the general decline in performance with advancing age. Should not the same tests used to show changes in physiological characteristics be employed to determine who is capable of performing a job at any age?

Through periodic medical examinations and multi-phasic screening employing blood pressure measurement and control, blood chemistry serum analysis and other cost effective measures, significant mechanisms exist for the early detection and correction of risk factors for cardiovascular disease. **The use of a graded exercise treadmill has been shown to be a powerful predictor of cardiovascular disease.** These tests need not be administered to everyone, but may be used judiciously on those individuals presenting primary risk factors.**Aging alone does not cause coronary artery disease,** just as advancing age does not imply the loss of requisite levels of physical fitness.

Davis & Dotson at 183-84. See also Hagberg & Yerg, Pulmonary Function In Young and Older Athletes and Untrained Men, 65 Journal of Applied Physiology 101, 103 (1988)(hereinafter

"Hagberg & Yerg")(vital capacity a "strong predictor of cardiovascular . . . mortality and cardiac failure.")(CP. EX. 78).

103. The five major risk factors for heart disease are smoking, elevated blood pressure, diabetes, elevated cholesterol, and family history of heart disease.(Tr.at 185).Other factors are age,overweight, diet, alcohol intake and environmental factors. (Tr. at 384, 550, 588-90).

104. While Dr. Hranac's testimony emphasized the relationship between the diminishment with age in heart and lung function, the need for short bursts of aerobic capacity in police work, and heart disease, evidence in the record indicates that the rate of diminishment of heart and lung function and aerobic capacity can be reduced by almost one half through a fitness program of regular exercise. (CP. EX. 78; Tr. at 549-50, 554-557, 562, 373-74, 380,384-85). Davis & Dotson at 181, 183. Hagberg & Yerg at 103. Pollock, Effect of Age and Training on Aerobic Capacity of Master Athletes, 62 Journal of Applied Physiology 725 (1987).

105. With respect to testing per se, Dr. Hranac's emphasis is on the inability of tests to accurately and reliably predict either heart disease or heart attack. (Tr. at 573). There are two problems with this position. First, this opinion is clearly contrary to that expressed in the medical journals cited above. See Finding of Fact No. 102. On the one hand, Dr. Hranac is not board certified in any specialty, and has been selected by the City of Estherville to conduct police candidate medical examinations. (R. EX. S; Tr. at 547, 584). On the other hand, the medical journals are refereed, i.e. articles submitted are reviewed by others with recognized medical expertise in the field discussed by the article prior to allowing their publication. (Tr. at 437-38). There is nothing to indicate that the authors have any connection with the parties. The articles were also relied on by Dr. Moe, who has a Ph.D. in exercise physiology and is board certified in the practice of general internal medicine (Tr. at 361). Although there are legitimate differences of opinion in medicine, it is very difficult to believe that these journals would refer to methods for predicting heart disease unless there were such predictors and, therefore, the journals' position has been adopted as a finding of fact.

106. The second problem with Dr. Hranac's emphasis on prediction, arises out of his testimony implying that the test or examination can be given only once and should be capable of predicting whether a person without the disease process will contract it in two, five, or ten years. (Tr.at 573). Neither this testimony nor other evidence demonstrates that present policies of (1) initial candidate testing, (2) enforcing the maximum age hiring limit and (3) doing essentially nothing to prevent or detect or assess the risk of heart disease, among incumbent police officers over age 40, are superior, with respect to protecting the public, to an alternative where (1) initial screening tests or examinations are given to candidates in order to detect or to assess the risk of (not predict) heart or other chronic disease; (2) fitness (or lifestyle intervention) programs are instituted to maintain the aerobic capacity and health of police officers; and (3) periodic examinations and appropriate tests are given to police officers to detect or assess the risk of heart or other chronic disease. Based on the evidence, it would appear the latter program would better serve Respondents' public safety goals than their present practices. See Findings of Fact Nos. 93106.

Laches:

107. Respondents did not raise this issue until the filing of their brief. Respondents Brief at 59-61. Although there has been a passage of time since the filing of the complaint, Respondents have established neither an unreasonable delay in the processing of this complaint, nor any prejudice to Respondents arising from such delay.

Damages: Respondents Have Not Proven That, If Complainant Montz Had Not Been Rejected Due to His Age, He Ultimately Would Have Been Rejected Due to His Failure to Have Qualifications Equivalent to an Associate of the Arts Degree in Law Enforcement.

108. As previously noted, one of the Respondents' affirmative defenses in this case is that Complainant Montz would not have been hired because he lacks ILEA certification, an Associate of the Arts degree in Law Enforcement or the equivalent. See Findings of Fact Nos. 22, 31.

109. The phrase "or equivalent" in Respondent's minimum standard requiring certification by the ILEA or having "a two year Associate Degree in Law Enforcement or equivalent" refers to the equivalent of the Associate of Arts degree in law enforcement, and not to the equivalent of ILEA certification. (CP. EX. 55; R. EX. J; Tr. at 971, 1133). This is so because, although the contrary is implied in Respondents' "Initial Application," there is no equivalent of ILEA certification. (CP. EX. 53; R. EX. CC -Interview with Brua, Forsyth and Farber at 19; Tr. at 199-201, 20406, 333, 971, 1133). Therefore, in order to be qualified for the position of Estherville police officer, Complainant Wontz must either have an ILEA certification, or an Associate of Arts degree in law enforcement or the equivalent of an Associate of Arts degree in law enforcement.

110. It is undisputed that Complainant Montz had neither an ILEA certification nor an Associate of the Arts degree in law enforcement. (CP. EX. # 53; Tr. at 182-84, 196). The only question remaining then is whether the Respondents have proven that he did not have the equivalent of an Associate of Arts degree in law enforcement.

111. Newly hired police officers without ILEA certification must be sent to either a 10 week ILEA course, an ILEA five week short course or be given a written test to obtain certification. (CP. EX. # 84; Tr. at 282-84, 334, 773, 970-71, 970,1028,1067,1069).

112. A key reason why Respondents seek candidates with ILEA certification or AA degree or equivalent is cost. (Tr. at 283, 1008-09). The cost of ILEA training is not incurred with candidates who are already certified. Those who have an AA degree in police science or criminal justice or who have completed law enforcement training which is commensurate with the basic training required in Iowa are eligible to take the 5 week short course, as opposed to the 10 week course. (R. EX. DD; Tr. at 205, 773, 970). The savings to the City of Estherville resulting from taking the short course is in the $4,000 to $5,000 range. (Tr. at 1008-009).

113. Even greater savings are possible with respect to those who, like the complainant, have out-of-state certification. The City would save another $4,000 to $5000 by hiring Montz, who would be eligible to achieve certification through taking and passing a written examination within one year of their hire. (R. EX. DD at § 3.1, 3.9; Tr. at 205, 970, 1008-09, 1070). Even if Complainant Montz had failed part of the examination, he would only have been required to "attend and

satisfactorily complete academy training covering those areas of deficiency within one year of hire." (R. EX. DD at § 3.9). Thus, insofar as cost savings are concerned, it is clear that certification at an out-of-state law enforcement academy is not only the equivalent of, but is superior to an AA degree.

114. Respondents have no written standards defining what constitutes the equivalent of an AA degree. (Tr. at 333). In at least one case, however, Respondents have treated certification at an out-of state law enforcement academy as being equivalent to an AA degree. The Respondents stated their position on this matter in their response of March 14, 1991 to the Commission's interrogatories, which were sworn to by Vaughn Brua:

One individual who graduated from the Atlanta Police Academy was allowed to test in February, 1988. The Atlanta Police Academy's course was deemed equivalent because it extended twenty seven full weeks and the Iowa Law Enforcement Academy's program is ten weeks in duration.
(CP. EX. # 84).

115. Mr. Brua, who is Estherville City Clerk as well as Civil Service Commission Secretary, was initially called to testify by the Iowa Civil Rights Commission's representative on May 15, 1991, the second day of the hearing. (CP. EX. # 84; Tr. at 256). At that time, he testified that Charles Molienhour was permitted, in 1988, to proceed to Civil Service Commission testing, although he possessed neither ILEA certification nor a degree in police science or criminal justice, because he had the equivalent in the form of certification by the law enforcement academy in Atlanta, Georgia. (Tr. at 285-87). This admission is consistent with the answers to interrogatories and is accepted as a credible and accurate statement of the facts.

116. Due to scheduling difficulties with other witnesses, Mr. Brua was not called for examination by the Respondents until the next day, May 16th. (Tr. at 359-60, 478). Mr. Brua was reminded that he was still under oath. (Tr. at 478). In the space of a day, a dramatic transformation occurred in Respondents' position. Suddenly, there is no longer a determination that Molienhour's out-of- state certification is the equivalent of.the Respondent's AA degree or ILEA requirements. Rather, he, has failed to meet those exact standards. Molienhour becomes "the only one individual who did not meet the standards" and was allowed to test during all the years that Brua was city clerk and secretary to the Civil Service Commission. (Tr. at. 482). When asked by counsel for Respondents, "How did that happen?", Brua responded:

I have no explanation for why it happened. A mistake is what it amounts to. It just slipped through, I guess. I wish it hadn't happened, but it didn't-or it did happen.
(Tr. at 482).

117. This patently false testimony casts serious doubt not only on Mr. Brua's credibility, but also on what remaining evidence there is (all of it testimonial) which might support Respondents' position that complainant's out-of-state certification is not the equivalent of an AA degree in law enforcement.

118. Civil Service Commission chairman Huntzinger, for example, testified that, after taking the tests, Mollenhour was not selected for the certified list due to failure to meet the ILEA and AA

degree requirements. (Tr. at 1162, 1174-75). There is no other testimony and no documentation confirming that this was the reason Mollenhour was not placed on the certified list. He also testified that Montz did not meet the AA degree equivalency requirements. (Tr. at 1 135). Huntzinger's erratic, inconsistent, and less than credible testimony, on the closely related issue of whether Respondents actually relied on the asserted failure to meet ILEA certification and AA degree equivalency requirements at the time of his rejection, has already been noted. See Findings of Fact Nos. 33, 39-41. Huntzinger's testimony on the issues of AA degree equivalency with respect to Molienhour and Montz is also not credible.

119. While testifying that Montz was not qualified for the position of patrol officer because he did not have ILEA certification or an Associate of Arts degree, Chief Farber also acknowledged that he did not investigate to determine whether Montz had the equivalent of them. (Tr. at 967, 969). He also acknowledged that he had no access to Complainant Montz' medical records, professional references, educational background, or his certification and training. (Tr. at 968). Under these circumstances Farber's testimony is entitled to little weight.

120. Farber also suggested that the two year AA degree equivalency would not be met by the combination of certification at an out of state, three years of police officer experience and training courses in the military. (Tr. at 976). This testimony is difficult to credit in light of the equivalency assigned to Mr. Molienhour based on his out-of-state law enforcement academy certification. See Findings of Fact Nos. 114115. It is also difficult to credit with respect to the previously cited ILEA rule which recognizes the equivalency of AA degrees in police science or criminal justice and satisfactory completion of training at other states' law enforcement academies when determining eligibility for the ILEA short course. See Finding of Fact No. 113. (R. EX. DD - 501 I.A.C. § 3.4.).

122. Respondent suggests on brief that "It would be absurd, of course, for anyone to argue that work experience or courses taken outside the academic confines of a college or university constitute the equivalent of a college degree when applying for a job. If that were the case, virtually everyone in our society could make such an equivalency claim and render such a standard meaningless." Respondents' Brief at 3.

123. There are at least two flaws in this argument. First, is not true that "virtually everyone in our society" could make a credible claim to work experience equivalency to an AA degree in criminal justice or police science. Respondents concede on brief that Lee Hollatz and Robert Burdorf were hired from the certified register for which Montz applied. Respondents' Brief at 4. Now if Hollatz did not have his associate of arts degree in criminal justice, and relied on his work experience of 2 1/2 years as a cabinetmaker and 3 1/2 years as a part-time game umpire, he would not have a credible claim to AA degree equivalency. (CP. EX. # 3). If Burdorf did not have his Bachelor of Arts degree in criminal justice, and relied on his paid employment experience of three months as a cook, one year as a lifeguard, and four summers as a doorman, he also would not have a credible claim to such equivalency. (CP. EX. # 4). Complainant Montz, on the other hand, with three years of experience in actually doing the job, would have a credible claim to such equivalency based on work experience alone.

124. Second, it is not "absurd..... to argue that work experience or courses taken outside... a college or university constitute the equivalent of a college degree when applying for a job." It is within the specialized knowledge of this agency, which is exposed to and knowledgeable of the personnel practices of many employers, that this is a common personnel practice, particularly among state government agencies. Official notice is taken of this fact. Fairness to the parties does not require that they be given the opportunity to contest this fact.

125. Complainant Montz' overall qualifications clearly exceed those of Lee Hollatz, who was hired in November of 1989. (Tr. at 981). With an equivalence to Hollatz' AA degree in criminal justice established by Montz' out of state law enforcement certification, Complainant Montz' work experience is obviously more job related than Hollatz. See Findings of Fact Nos.5-6, 8-11, 113-115, 123. There is no evidence of Hollatz having taken any continuing in-service training courses similar to those undertaken by Complainant Montz. See Finding of Fact No. 9. (CP. EX. 3, 53). These include a 40 hour First Responder course which provided instruction for police officers, who are often the first at accident scenes, on how to render medical aid to victims. (Tr. at 88). This function is also performed by the Estherville police. (Tr. at 1000). Neither Montz nor Hollatz had ILEA certification. (Tr. at 1067). See Finding of Fact No. 110.

126. The reasons given by Chief Farber for wanting an AA degree or the equivalent include professionalism, ability to handle course work, better people and communication skills. (Tr. at 981-82). As demonstrated by his experience, references, and his successful completion of numerous courses, Complainant Montz already had these skills and professionalism. (CP. EX. 53).

127. Police Chief Farber also suggested that the only equivalent to an Associate of Arts degree in criminal justice or police science was a Bachelor of Arts or Master of Arts degree in the same subjects. (Tr. at 975). Bachelor of Arts and Master of Arts degrees are not equivalent but higher degrees than the Associate of Arts degree. This testimony does not counter the established fact that the Civil Service Commission found Mollenhour's out of state law enforcement certification to be equivalent. See Finding of Fact Nos. 114-15. Farber agreed that his standards on equivalency were the Civil Service Commission standards. (Tr. at 1071-72).

129. Based on the above findings of fact, the Respondents have not established that Complainant Montz would have been rejected because his qualifications were not equivalent to an Associates of Arts degree in criminal justice or police science.

Compensatory Damages:

Mitigation of Damages and Back Pay:

Mitigation of Damages:

130. Respondents have failed to prove that there were suitable positions which Complainant Montz could have discovered and for which he was qualified. They have also not established that Montz failed to use reasonable care and diligence in searching for a position.

131. Complainant Montz' work search was reason-ably limited to the local area in and around Estherville for several reasons. He initially returned to Estherville, in the summer preceding what he later anticipated would be his permanent move to that city, in order to see his father who was dying from terminal cancer. He promised his father he would return and take care of his mother who was ill with Alzheimer's disease. (Tr. at 51, 236). He moved to Iowa for that specific reason. (Tr. at 229). Prior to his move to Estherville, he had a telephone job interview with the police department in Emmetsburg, Iowa. (Tr. at 54-55, 233). He withdrew his application when he was informed that their department had a residence requirement which mandated that he live within that city. (Tr. at 54-55). It is common for police departments to have such requirements. (Tr. at 234). He withdrew as it was necessary for him to live in Estherville so his mother could be maintained in her own house. Due to her illness, it was necessary that she be kept in familiar surroundings. (Tr. at 230, 233). This situation continued throughout Montz' time in Iowa. (Tr. at 7071).

132. After he moved to Estherville, he had additional reasons for limiting his search to the local area. His wife was employed as a nurses aide at Rosewood Manor and, before that, with Kimberly Health Care as a home health aide. (Tr. at 222, 228). He had also obtained a home and had to maintain it and had his children in school in the area. (Tr. at 236). Neither he nor his wife had ever resided in Minnesota or any other part of Iowa. (Tr. at 228).

133. Complainant Montz did obtain a local job as a stock clerk at Stalls Farm and Home which he stayed in from September 1989 until his return to employment at the Bath, Maine police department in March of 1991. He was still employed at the Bath position as of the date of the hearing. (R. EX. F; Tr. at 1 1).

134. Lee Hollatz was hired as a police officer by the City of Estherville from the certified list for which Montz was not permitted to compete on November 8,1989. (R. EX. F at 17; CP. EX. 85).

135. Complainant Montz continuously looked for local law enforcement jobs, and other jobs that paid better than the position at Stalls, throughout his time in Estherville. There were very limited opportunities. (Tr. at 70, 113-14, 142, 234-35). On March 29, 1990, Complainant Montz applied for the Director of Veterans Affairs position for Emmet County. (R. EX. 1; Tr. at 113). He became one of the final two candidates, but was not hired. (Tr. at 113).

136. Montz also applied for the position of jailer with Emmet County, but was not hired. (Tr. at 235, 699).

137. There is no evidence in the record indicating any other police positions, or any higher paying jobs than Stalls, that were open in the local area between November 1, 1989 and March 1991.

Gross Back Pay and Benefits:

138. The back pay period runs from November 8, 1989, the day Lee Hollatz was hired as an Estherville police officer, to March 1991, when Complainant Montz returned to a higher paying

position as police officer in Bath, Maine. Medical and other benefits were comparable to those in Estherville. (Tr. at 127-28). See Findings of Fact Nos. 133-34.
139. The gross back pay for this period, including paid vacation, sick leave, bereavement leave, personal leave, an all other paid leave benefits extended by the City of Estherville is $26,919.07. (CP. EX. # 85).

140. The total of health, life, accident and disability insurance premiums paid by the city for this period are $2302.98. (CP. EX. # 85).

141. The total of other benefits from the city for this period are $373.78. (CP. EX. # 85).

142. The total of gross back pay, premiums and other benefits is $26919.07 + $2302.98 + $373.78 = **$29595.83.**

Interim Earnings:

143. From November 6, 1989 to July 10, 1990, Complainant Montz earned $9017.30 at Stalls. (R. EX. Z). Over that 35 week period, this would constitute an average of $257.64 per week. On or about December 15,1990,Complainant had a pay raise from $5.10 to $5.30 per hour, a four per cent increase. (R. EX. F; Tr. at 81-82). The interim earnings for the 22 week period from July 10, 1990 to December 15, 1990 are ($257.64 X 22 weeks) = $5668.08. With the four percent increase, the weekly earnings are increased to $267.95 for the 1 1 week period from December 15, 1990 to March 1, 1991. Therefore the earnings for that period are ($267.95 X 1 1 weeks) = $2947.45. Total interim earnings = $9017.30 + $5668.08 + $2947.45 $17,632.83.

144. The net back pay due Complainant Montz is: Gross Back Pay - Interim earnings = Net Back Pay. $29595.83 - $17,632.83 = $11963.00. NET BACK PAY.

Moving Expenses:

145. Moving expenses for the Complainant's return to the police officer position in Bath, Maine are as follows:

A. Motels	Budgeteer	$28.55
	Luxury Inn	38.15
B. Gas	Mobil Oil	$27.57
	Phillips	38.73
	Sohio	23.80
	Gulf	46.01
	Amoco	28.37
	Unocal	30.75
C. Meals	Ponderosa	$7.30
	Charlies	9.42
	Burger King	5.94

	Burger King	4.29
	Starr Inn	5.67
	Receipt "Food""Server"	6.48
D. Moving Van	Wilson Oil	$1214.88
E. Turnpikes	Massachusetts	6.45
	New Hampshire	3.00
	Ohio	9.00
	Indiana	10.35
TOTAL MOVING EXPENSES:		$1544.71

(CP. EX. 69; Tr. at 107, 176).

146. It should be noted that the above figure does not include air fare costs of $278.00 for the Complainant's return for the public hearing. These are not moving costs.

Loss on Sale of House:

147. On moving to Estherville, Complainant Montz purchased a house for his family to live in. The house was located next to his mother's residence in order to facilitate taking care of her. Complainant Montz had to do a great deal of interior remodeling in order to make the house fit the needs of his family. (Tr. at 107-08, 231-32). Montz had every intention of living permanently in the house and would have done so if he had been hired as a police officer by the City of Estherville. (Tr. at 109, 233). Because of the Respondents' failure to hire him, he ultimately had to return to his position in Maine. It was therefore necessary for him to sell the house at a loss of $9,000.00. (CP. EX. 69; Tr. at 108-110). But for the Respondents' failure to hire him, he would not have incurred this loss and should be compensated for it.

Emotional Distress:

148. Complainant Montz suffered substantial and serious emotional distress directly as a result of Respondents' refusal to permit him to compete for and ultimate failure to hire him for the position of police officer in Estherville. The distress continued from his rejection on September 22, 1989 until early March of 1991. (Tr. at 68, 70, 622,133).

149. Montz was angered by the rejection letter from Brua, which was received the day after Montz applied. (Tr. at 70, 622). He felt, accurately, that his past police experience, training, military experience and all his other qualifications were ignored due to his age. (Tr. at 70). The rejection was like a slap in the face to Complainant Montz. He just could not believe that these type of practices still existed. (Tr. at 613-14, 622).

150. Complainant Montz was also frustrated, disappointed, and distressed because the rejection meant that, for the foreseeable future in order to support his family, he would still have to

perform meaningless, simplistic, menial work with little responsibility, that he hated. (Tr. at 114-115, 614). This was like being:

slapped back in grammar school down in first or second grade, that you had to work for an employer that was right behind you and says, well, basically, for you how to close this door or where to put this piece or thing or how to check this piece of freight in. [A]fter being . . . responsible enough to go out and enforce the laws in Maine and have enough common knowledge and discretion to do that, and then be forced to have to work out there, where your every move was supposedly dictated because they figured you didn't have enough brains to . . . find out where to put this certain box, or being a go-fer because he didn't want to walk out to his truck and put a bag of stuff that he purchased, you would have to take that out and stick it in his truck.

(Tr. at 1 1 4-1 5).

151. Complainant Montz was a dedicated, professional police officer who loved police work. (CP. EX. # 53; Tr. at 117, 607, 615-16). After the rejection, he would see a police officer on the street in Estherville and felt, "it's like somebody wants to--they rip out that part of you." (Tr. at 117).

152. Complainant Montz also went into a period of depression due to his rejection by the City of Estherville. (Tr. at 123,126, 615). This continued until early March of 1991, when he was talking to the Bath Maine police chief mentioning that they had an opening, which was like somebody "open[ing] up the sky and let[ing] sunshine in." (Tr. at 126, 133).

153. Montz' depression manifested itself in a variety of ways. He began drinking more. (Tr. at 123). He would tell his wife, "I hope you aren't disappointed in me." (Tr. at 617). He lost interest in activities such as boy scouts, fishing, hunting and skeet shooting. (Tr. at 123, 623). Before his rejection by Respondents, one of James Montz' favorite activities after work was to go out in their yard with his wife and do yard work together. After the rejection, he did not want to do anything, except talk about how disappointed he was in not getting a position as police officer. (Tr. at 61516).

154. The rejection of Montz also adversely affected his relationship with his son. (Tr. at 238). His son lost respect for him. (Tr. at 238, 252, 617). He would say, "Well, Dad is just a go-fer here" or "works for Bob Stall out there." (Tr. at 116, 616). Although the first problem with the son manifested itself in the summer of 1989, the son's behavior after the rejection included staying out until 1:00 a.m. and being involved with drinking and driving. (Tr. at 115, 140). His son knew that Montz was continuing to try to obtain a law enforcement position and would taunt Montz by pointing out that, if he physically disciplined him, he would report him for child abuse and thus damage his chances for a career. (Tr. at 116, 238, 618). After Montz was rehired as a police officer in Bath, Maine, and the family returned there, his son's behavior and lack of respect ended. (Tr. at 172, 239).

155. There were other stressors in Complainant Montz' life during this time. His father's death affected him. His mother's continuing affliction with Alzheimer's disease was also distressing.

(Tr. at 51, 116, 134-139, 625). In the summer of 1989, the absence of his wife, and his failure to obtain a position with the Emmet County Sheriff's Department in the summer of 1989 also caused some distress, but it should be noted that these events, like the death of his father, occurred before his rejection by the Respondents. (R. EX. B; Tr. at 51, 236, 153, 170, 253, 626).

156. It should also be noted that Montz did not miss work or require medical treatment due to his emotional .distress. (Tr. at 164, 166, 172). Evidence was introduced to the effect that he was, in July of 1990, willing to settle for $2000.00 in emotional distress damages. (R. EX. Z; Tr. at 644). This offer was rejected by Respondents. (Tr. at 646). The Commission is in no way bound to awarding this figure which was reached at a time Montz was apparently not represented by counsel. (R. EX. Z). As a lay person without exposure to civil rights law and cases, he would not be expected to have any idea of what would constitute a fair and appropriate amount for his distress. Also, the distress continued for eight months beyond the date of the offer. (Tr. at 126, 133).

157. The Complainant is seeking $70,000 in emotional distress damages. This is far too high under this record. In light of the severity and duration of the distress suffered by Complainant Montz due to the age discrimination which was inflicted upon him by Respondents, an award of ten thousand dollars ($10,000) would be full, reasonable, and appropriate compensation. In making this award, care has been taken to ensure that no award is made for damage caused solely by other sources of distress.

Credibility and Expert Opinions:

158. Based on his calm and credible demeanor and his testimony, which was internally consistent and consistent with the greater weight of the credible evidence on all material issues, Complainant Montz was a credible witness. Respondents made one attack on brief on Complainant's credibility. Respondents asserted that he lied when he told the Commission, during the course of the investigation, that he was qualified for the position as he possessed the equivalent of ILEA certification or an AA degree in law enforcement. Respondents' Brief at 6-7. At one point in the hearing, Respondent conceded that inquiry into this question was not worth pursuing. (Tr. at 680). Nonetheless, since it has been found that Montz was, in fact, qualified, this attack has been defeated. See Finding of Fact No. 125. Furthermore, at the time Montz talked to the investigator he had no reason to believe that Respondents would later claim that he was not qualified. He reasonably believed, based on the Respondents' "Initial Application," which clearly implied, in questions 28 through 30, that there were equivalents to both ILEA certification and the AA degree in law enforcement, that he possessed such equivalents in light of his certification from the Maine State Criminal Justice Academy, his three years as a full time law enforcement officer, his two years as a reserve deputy sheriff and other qualifications. (CP. EX. # 53).

159. Based on their demeanor and internally consistent testimony, Charleen Montz, Carol Leach, and Sheriff Larry Lamack were also credible witnesses. Murlean Hall, who testified by telephone, was also a credible witness.

160. Vaughn Brua's credibility was questionable. At times, he had to be reminded to speak up and to pay close attention to the questions and answers. (Tr. at 479, 493, 494, 538). His demeanor at times was such that he gave the impression that he was either under pressure or wasn't sure of what he was talking about. Also, as previously noted, his testimony of May 16th on associate of the arts degree equivalency was absolutely incredible in light of his prior inconsistent statements and testimony. See Finding of Fact No. 116. Nonetheless, other testimony of his seemed to be credible and was relied on in light of its consistency with the greater weight of the credible evidence or where it constituted an admission.

161. Barry Huntzinger was not a credible witness. Mr. Huntzinger was the one witness who gave the impression that he would say just about anything to win. His testimony is not only erratic and internally inconsistent, it is not consistent with the greater weight of the evidence. See Findings of Fact Nos. 33, 39-41, 83, 118. With few exceptions, his testimony is only relied on when it is background information or is supported by other credible evidence or other indicia of reliability.

162. City Attorney Gordon Forsyth was a credible witness, with some exceptions. His assertion to the effect that he relied on the Bona Fide Occupational Qualification exception in formulating the Respondents' maximum age hiring limit is difficult to credit in light of his repeated admissions that the formulation of this standard is not tied to ability to the job. (R. EX. CC; Tr. at 788, 799-800, 822-23). But this appears to be an error of law rather than evasive testimony. Attorney Forsyth's opinion testimony on legal matters is entitled to no weight as his testimony on legal matters was not offered as expert testimony on age or other discrimination or police matters, but solely to illustrate the Respondents' decision-making process. (Tr. at 828, 830, 831).

163. Dr. Richard Moe was a credible expert witness, whose opinions are entitled to significant weight. Dr. Moe is board certified in the practice of general internal medicine. He also has a Ph.D. in Exercise Physiology. (CP. EX. 70). Exercise physiology is concerned with the effects of exercise or the lack of it on the human body. (Tr. at 364). Since 1985, Dr. Moe has been employed as an independent contractor with the Iowa Methodist Medical Center and is in charge of their executive fitness program. In that program, he works entirely with a clientele who are still in the workforce, administers tests to determine their state of wellness, and makes suggestions on how to improve their fitness. (Tr. at 362-63). He also is medical director for the Maytag Company. Of especial interest for this case is Dr. Moe's work with the Ames Police Department. He does repeated treadmill testing for incumbent officers in order to determine their present fitness level and to ascertain whether or not there is evidence of heart problems. He has also familiarized himself with the physiological demands of police work through reading the literature. (Tr. at 363, 391). His testimony was amply supported by data set forth in empirical studies from the medical literature. (CP. EX. 78).

164. It is simply not significant that, until shortly before the hearing, Dr. Moe was not familiar with the term Bona Fide Occupational Qualification as his testimony was not given as an expert with respect to that term. (Tr. at 434). Respondents' Brief at 47. He ultimately familiarized himself with it and offered, from his medical perspective, an opinion that the Respondent's not-yet-33 hiring limit is not a BFOQ. His opinion on this matter was elicited by respondents and not offered by Complainant or the Commission. (Tr. at 427). His opinion testimony was primarily medical testimony relating to the medical or physiological usefulness and rationality of the Respondents' employment practice and alternatives to such practice. The determination as to

whether Respondents has proven that their maximum hiring age limit is a BFOQ is largely a legal question which will be ultimately determined by this Commission, and not by any witness.
165. Nor does the surface contradiction between Dr. Moe's testimony that "one of the minor risk factors is age" and the quotation from the medical text The Heart, which states, in part, "age is the most important Risk-factor for manifest ischemic heart disease," impugn Dr. Moe's credibility. (Tr. at 384, 439). Respondents' Brief at 47. When Dr. Moe's full opinion on age as a risk factor, (Tr. at 384,462-63); Dr. Hranac's full opinion on the same topic, (Tr. at 594-95); and the full quotation are examined, (Tr. at 439), the same ultimate message results: to speak of age as a risk factor is to recognize that if you live long enough, eventually you should die of heart disease. In this context, as Dr. Hranac's testimony indicates, age as a risk factor for a 70 year old person is very important when the 70 year old is compared to a 50 year old. But there is no appreciable difference between the risk for a 35 year old versus a 30 year old, or a 40 year old vs. a 35 year old. (Tr. at 594- 95).

166. Finally, it should be noted that it is not Dr. Moe's testimony that Respondents must look for the physically exceptional, the "Nolan Ryans" of the world. (Tr. at 467). Respondents' Brief at 48. Due to the wide variation in physical ability, which gets wider as people age, Respondents maximum hiring age limit will predictably screen out many physically qualified candidates who are not Nolan Ryans. See Findings of Fact Nos. 70-71.

167. Dr. Robert S. Hranac has been in family practice since 1975, and has been located in Estherville since 1978. He has twice served as chief of the medical staff of the local hospital. (Tr. at 547). He also is selected by Respondents to administer physical examinations to police officer candidates and has done so many times. (R. EX. S; Tr. at 547). He takes approximately 50 hours per year of required continuing education courses, a significant portion of which deal with arthritis, lung, and heart disease. (Tr. at 548). He is not board certified in any specialty. (Tr. at 584).

168. Approximately 40-50% of Dr. Hranac's patient., are elderly, i.e. at age 60 or above, which places many of them at an age greater than the endpoint (age 65) of the occupational life span for police officers in general and certainly beyond the endpoint (age 53) for the police officers leaving the force in Estherville during the decade ending in 1989. (Tr. at 586). See Findings of Fact Nos. 72, 90, 94-96. A significant proportion of his practice consists of consulting to nursing homes. (Tr. at 586). His service to the caretakers of the elderly and extreme aged is recognized by his receipt of the Physician of the Year Award from the Nursing Home Association of Iowa. (Tr. at 547).

169. While much of Dr. Hranac's opinion testimony is credible and entitled to weight, some of it, as has already been noted, is not. See Findings of Fact Nos. 105-06. Dr. Hranac's testimony with respect to aerobic capacity, police work and heart disease and public safety is also reflected in empirical studies submitted by the Complainant. See Findings of Fact Nos. 100, 104. Dr. Hranac's ultimate conclusions with respect to the efficacy of testing program alternatives and favoring the necessity of Respondents' maximum age hiring limit is supported by scant statistical data and no studies and are not accepted. See Findings of Fact Nos. 89-92. Finally, Dr. Hranac's opinion that most people as they age become more rigid in their lifestyle, rigid in their opinions, and more inflexible in their ability to deal with different situations and stresses is not accepted.

He cited no data nor specific experiences to support this conclusion and it is, therefore, entitled to no weight. (Tr. at 552).

170. Dr. Paul Muchinsky is a highly qualified industrial psychologist. Industrial psychology is concerned with the application of industrial psychology to the world of work. Dr. Muchinsky's full qualifications are set ' forth in Respondents' Exhibit HH. Dr. Paul Muchinsky possesses a Ph.D. degree in Industrial/Organizational Psychology. He has been a Professor of Industrial and Organizational Psychology at Iowa State University since 1976. He is a Fellow in the American Psychological Association and American Psychological Society and an Accredited Personnel Diplomate with the American Society of Personnel Administration. He is the author of numerous articles in his field and of the best selling undergraduate text on industrial psychology. (R. EX. HH). He has advised police and fire departments, including the Des Moines Fire Department on personnel matters. (Tr. at 841-42). Dr. Muchinsky was paid $1500.00 per 10 hour day for his testimonial services by Respondents. (Tr. at 869).

171. It should be noted that, although Dr. Muchinsky had some familiarity with the hiring criteria and the Estherville Police Department, he neither conducted a job analysis of the patrol officer position nor was aware of one. (Tr. at 844, 880-81). Such a study by an industrial psychologist would normally be undertaken in order to identify actual criteria which are as close as possible to the ultimate criteria as defined below. (Tr. at 880). This deficiency seriously undercuts Muchinsky's opinion that being under the age of 33, a criterion which was not identified as being closely related to ultimate criteria through job analysis, is based on the nature of the occupation. (Tr. at 845).

172. It would be fair to say that Dr. Muchinsky, nonetheless, gave credible opinions on other issues which were helpful to both sides. See Findings of Fact Nos. 62, 74, 76.

173. Some opinions of Dr. Muchinsky are not, however, accepted. Dr. Muchinsky repeatedly opined that setting an upper age limit for patrol officers or one within the age range of 30 to 35 was "reasonable." (Tr. at 845, 846, 855). He also testified that "it is totally fair and reasonable for them to do it the way they are doing it." (Tr. at 862). He further opined that the 33 maximum age cutoff was fair and reasonable. (Tr. at 897).

174. Leaving aside the legal question of whether mere fairness or reasonableness can ever establish a BFOQ, these opinions were substantially undercut on cross-examination. See Conclusions of Law No. 84-86, 101. He explained that in his field the phrase ultimate criterion" applies to "the person's actual capacity to perform the job. . . ." or the ability to do the job in a theoretical state. (Tr. at 878). "Deficient criterion" is defined as "the degree to which the actual criteria used in selecting job applicants, for example, are deficient in representing the ultimate criteria." (Tr. at 878-79). "Error" refers to the extent to which the actual criteria are not related to anything at all. "Bias" .refers to the extent to which something other than the ultimate criteria is being measured. (Tr. at 87879). Dr. Muchinsky then admitted that he did not believe the age of 33 in and of itself was a fair, unbiased, and non erroneous surrogate for other criteria. (Tr. at 891-92).

175. His opinion that a hiring limit somewhere in the age range of 33 to 35 is essential to the safe and efficient performance of the duties of patrol officers in the City of Estherville given the conditions and job structure is also seriously undercut by the lack of any job analysis and is rejected. (Tr. at 898). In addition, it is clear from his testimony that, based on the 1984 Avolio article (R. EX. MM), he believed the only existing alternative to the age hiring limit was a purely functional age measure which had several problems. See Finding of Fact No. 74. The Avolio article recommended a different approach, to look for intrinsic individual attributes to be used in the assessment of individual capacity to meet the job. See Finding of Fact No. 76. There is nothing in the record to indicate that he was aware that Davis & Dotson had, in fact, devised job related tests by 1987 based on this approach. See Finding of Fact No. 77. His lack of awareness of this professionally validated alternative renders this opinion untenable.

CONCLUSIONS OF LAW

Jurisdiction:

1. James A. Montz' complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 601A.15(11) (1989). See Finding of Fact No. 1. All the statutory prerequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing ' Iowa Code § 601A.15 (1989). See Finding of Fact No. 2.

2. James Montz' complaint is also within the subject matter jurisdiction of the Commission as the allegations that the Respondents instituted, maintained, informed him of, and rejected him due to its maximum age hiring limit all fall within the statutory prohibitions against unfair employment practices. Iowa Code § 601A.6 (1985). "It shall be a ... discriminatory practice for any person to refuse to hire, accept . . . for employment . . . or to otherwise discriminate in employment against any applicant for employment because of the age of such applicant ... unless based on the nature of the occupation." Id. at 601A.6(l)(a). "It shall be a . . . discriminatory practice for any . .. employer ... agents, or members thereof to directly or indirectly advertise or in any other manner indicate or publicize that individuals of any particular age . . . are unwelcome, objectionable, not acceptable, or not solicited for employment or membership unless based on the nature of the occupation." Id. at 601A.6(l)(c).

Official Notice:

3. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code § 17A.14(4) (1991). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

Federal Court Decisions as Precedent:

4. Federal court decisions applying Federal anti-discrimination laws are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. E.g. Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829,831 (Iowa 1978).

Nonetheless, they are often relied on as persuasive authority in these cases. E.g. Iowa State Fairgrounds Security v. I Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although even decisions of the United States Supreme Court have been rejected as persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831; Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866-67 (Iowa 1978), its opinions are often entitled to great deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission at 866. In determining the persuasive value of any Federal decision, or decision of another state, or other legal authority, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century" Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971); and that, when determining its legal effect, the Act "shall be broadly construed to effectuate its purposes." Iowa Code § 601 A.1 8. (1991).

Order and Allocation of Proof When Complainant Relies on Direct Evidence of Discrimination:

5. For reasons previously set forth in paragraphs 1 through 4 of the Ruling on Motion to Dismiss on pages 11 through 13 of this decision, the order and allocation of proof which applies in this case is that which is appropriate when the Complainant relies on direct evidence to meet his burden of persuasion with respect to age discrimination.

6. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice discriminates against the complainant because of the prohibited basis; third, to consider any affirmative defenses of the respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. See Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act). Respondents must persuade the finder of fact by the preponderance of the evidence with respect to any of their affirmative defenses. See **Landals v. Rolfes Co.**, 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 11 1, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

Direct Evidence of Violation of Iowa Code § 601A.6(l)(c) [indication by Employer or Its Agents That Individuals of Any Particular Age Are Not Acceptable for Employment]:

7. There is sufficiently probative direct evidence in the record to establish that Respondents Vindicated . . . that individuals of any particular age [i.e. individuals age 33 or over]..... are unwelcome, objectionable, not acceptable..... for employment." Iowa Code § 601A.6(l)(c). See Findings of Fact Nos. 20-21, 23-24, 27- 28.

Violation of Iowa Code § 601A.6(l)(a)[Prohibition Against Failing to Consider or Hire Applicants Based on Age]:

8. There is sufficiently probative direct evidence in the record to establish that Respondents "refuse[d] to hire, accept ... for employment ... or ... otherwise discriminated in employment against any applicant for employment because of the age of such applicant." Id. at 601A.6(l)(a). See Findings of Facts Nos. 20-21, 23-24, 25-30, 35-38.

9. The Respondents affirmative defenses shall be discussed below. It should be noted, however, that Respondents failed to meet their burden of persuasion with regard to establishing any of their affirmative defenses to these allegations.

The Same Decision Defense As Either A Complete or Partial Affirmative Defense to A Charge of Discrimination:

10. Respondents have asserted that they have a complete defense to Complainant Montz' allegations as, irrespective of his age, they would not have hired him in any event due to his failure to have ILEA certification or an Associate of Arts degree in law enforcement or the equivalent of such degree. Respondents' Brief at 7-8. Respondents have not established this defense, however, because they proved neither that they actually relied on these nonage reasons at the time Montz was rejected nor that Montz did not have qualifications which were equivalent to an AA degree in police science or criminal justice. See Findings of Fact Nos. 31-41, 108129. Even under Respondents' understanding of the same decision defense, that after-the-fact reasons not relied on at the time of Montz' rejection can provide a complete defense to liability, their failure to prove the later fact was fatal to their defense. Respondents' Brief at 7-8.

11. It should be noted that, under current Federal Title VII law, due to the amendments enacted under Section 107 of the Civil Rights Act of 1991, under no circumstances can the employer, by proving that it would have made the same decision irrespective of the fact that race, color, religion, sex or national origin was a motivating factor in its decision, effect a complete defense to liability. Such proof will only limit the remedies available to declaratory and injunctive relief, attorney's fees and costs. 42 U.S.C. §§ 20OOe-3(m); 20OOe-5(g)(2)(B). This section was enacted in order to legislatively overrule the United States Supreme Court's Price-Waterhouse decision, a Title VII decision, which allows such a complete defense. 4 Employment Discrimination Coordinator 58597 (RIA)(1992)(citing S. Rept. No. 101-315, 6/ 8/90, pp. 6, 7, 48); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268, 293). Section 107, therefore, seriously weakens the persuasive effect of this holding of Price-Waterhouse.

12. Although Price-Waterhouse and the same decision defense have been discussed as a matter of legal theory in two Iowa Supreme Court opinions written prior to the Title VII amendments, the discussion was not essential to the decisions and the theory was never been applied to the facts of the cases. Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); HY-Vee Food Stores v. Iowa Civil Rights Commission, 453 N.W.2d 512, 517 (Iowa 1990). The discussion, in other words, may well be dicta, and not controlling law.

13. It is the Commission's position that the same decision defense should be limited, as it now is under Title VII, and was in the 8th and 9th Circuits prior to Price-Waterhouse, see Price-Waterhouse, 104 L.Ed. 2d at 280 n.2 (citing Bibbs v. Block, 778 F.2d 1318, 1320-24 (8th Cir.

1985), to limiting the damages remedy of the Complainant while not establishing a complete defense to liability. This would allow attorney's fees and injunctive relief to end discriminatory practices while ensuring that damages were not awarded in inappropriate cases. Nonetheless, the legal issues presented by the Respondents' same decision defense will be treated as if the statements in Landals and Hy-Vee are not dicta, but controlling law. Price-Waterhouse will be treated as persuasive authority.

14. In order for an employer to establish, as a complete defense to a charge of discrimination, that it would have made the same employment decision even in the absence of age discrimination, it must show that -it actually relied on, i.e. was influenced or motivated by, the factors which it asserts as legitimate reasons for the decision at the time the decision was made. Landals v. Rolfes Co., 454 N.W.2d 891, 89394 (Iowa 1990); Hy-Vee Food Stores v. Iowa Civil Rights Commission, 453 N.W.2d 512,517 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228,109 S.Ct. 1775, 104 L. Ed. 2d 268, 289, 293).

15. "Where direct evidence is presented and the employer suggests other factors influenced the decision, the employer has the burden of proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the improper factor." ' Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990)(citing Price Waterhouse v. Hopkins, 490 U.S. 228,109 S.Ct. 1775, 104 L.Ed. 2d 268, 293)(emphasis added). "When . . . an employer considers both [age] and legitimate factors at the time of making a decision, that decision was 'because of' [age]." Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268, 281 (1989) (emphasis added).

16. This defense is an affirmative defense. Id. at 287. The Respondent bears the burden of persuading the finder of fact by a preponderance of the evidence that "it would have made the same decision even if it had not taken the plaintiff's [age] into account." Id. & 293. A finding of liability can be avoided by the respondents only if they meet this burden of proof. Id. at 293.

[T]he employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, **proving "that the same decision would have been justified ... is not the same as proving that the same decision would have been made." ... An employer may not, in other words prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.** Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason.... The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Id. at 289. (emphasis added).

17. The above authorities demonstrate that a complete defense to liability cannot be established based on post-hoc reasons not relied on at the time the employment decision is made. In Price Waterhouse, "the Court only allowed a defendant to escape liability if he was motivated by a legitimate reason *at the time of the decision*, not if the justification for the decision was pieced together after the fact." Sabree v. Carpenters and Joiners, 921 F.2d 396, 54 Fair Empl. Prac. Cas.

1070, 1075 (lst Cir. 1990)(italics in original)(citing Price-Waterhouse, 109 S.Ct. at 1791). However, remedies may be limited if the employer proves through credible after-the-fact evidence that the Complainant would inevitably not have been hired. See Id.. Respondents have failed to prove this. See Findings of Fact Nos. 108- 129.

18. Although Respondents have failed to prove that complainant Montz would not have been hired even in the absence of discrimination, it should still be noted that the cases cited by Respondents do ' not support the proposition that a complete defense to a charge of discrimination can be made by demonstrating that lawful reasons not actually relied upon by the employer at the time of the employment decision would have resulted in a failure to hire the complainant. Respondents' Brief at 7-8. It is true that the Eighth Circuit quoted the Eleventh Circuit's Bell decision's statement that "Once an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only *by proving* by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor." Perry v. Kunz, 878 F.2d 1056, 1061, 50 Fair Empl. Prac. Cas. 175, 179 (quoting Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (1 1 th Cir. 1983) (italics in Perry).

19. Nonetheless, the Bell decision, as noted in Perry, was quoting from a prior Eleventh Circuit decision. Id. (citing Lee v. Russell County Board of Education, 684 F.2d 769, 774, 29 Fair Empl. Prac. Cas. ' 1508,1513 (llth Cir. 1982)). In that case, the Eleventh Circuit held **"if there was no evidence that asserted reasons** for (the challenged employment action] **were actually relied on,**the reasons are **not** sufficient to meet defendant's rebuttal burden." Lee v. Russell, 29 Fair Empl. Prac. Cas. at 1513 (emphasis added). The Perry decision also cited Price-Waterhouse and Bibbs v. Block as authority sifter the Bell quotation. Perry v. Kunz, 50 Fair Empl. Prac. Cas. at 179. As previously noted, Price-Waterhouse stands for the proposition that **"proving 'that the same decision would have been justified ... is not the same as proving that the same decision would have been made."'** See Conclusion of Law No. 16. Bibbs and Price-Waterhouse are both consistent with the conclusion that a complete defense to liability cannot be established by after-the fact reasons. See Conclusions of Law Nos. 13,16.

Reliance on Legal Advice of Counsel or of the Director of the Iowa Law Enforcement Academy Is Not a Defense to a Charge of Discrimination Under the Iowa Civil Rights Act:

20. Respondents argue, on brief, that their reliance on a number of sources of authority, including advice of the City Attorney and of the Director of the ILEA, constitutes a defense in this case which is somehow similar to the defense of a city government's reliance, in enacting a mandatory retirement program for police officers, on a state legislature's enactment of a law expressly permitting such policies. Respondents' Brief at 32-36 (citing EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980).

21. Unlike Janesville, this case involves a mandatory hiring age limit, and not a mandatory retirement plan. Janesville supports the proposition that Federal courts may accept and defer to state legislative judgments, including "the statutory presumption that age is a BFOQ for the class of protective service workers covered under the Wisconsin Public Employees Retirement Act," and recognize such judgments as a defense. Janesville at 1258-59. It does not support the

proposition that a city is permitted to violate the will of the state legislature, as expressed in the Iowa Civil Rights Act, based on the advice of a city attorney or the head of a state agency or other government officer. Even reliance on the advice of this agency, if such had been shown to have been requested and given, would not constitute a defense to a prosecution by this agency:

Government officers "are but the servants of the law, and, if they depart from its requirements, the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it."

Schwartz, Administrative Law § 3.18 (1984)(quoting Moffat v. Limited States, 112 U.S. 24, 31 (1884)).

Iowa Code Section 400.8 Merely Recognized That Some Civil Service Commissions Set Age Limits and Required Those Commissions to Prescribe and Publish Any Such Limits In Their Examination Rules. It Neither Required Nor Empowered Civil Service Commission to Enact Such Age Limits.

22. Iowa Code section 400.8 consists of three subsections which describe the examination and appointment process for police and fire fighter positions which is administered by civil service commissions in Iowa. Iowa Code § 400.8. Subsection 1 states, in relevant part:

400.8 Original entrance examination--appointments.

> 1. The commission, when necessary under the rules, including minimum and maximum age limits, which shall be prescribed and published in advance by the commission and posted in the city hall, shall hold examinations for the purpose of determining the qualifications for positions under civil service. . . . An applicant shall not be discriminated against on basis of height, weight, sex, or race in determining physical or mental ability of the applicant. Reasonable rules relating to strength, agility, and general health of applicants shall be prescribed.

Iowa Code § 400.8 (1991)(as amended effective May 22, 1989)(emphasis added). Language recognizing that some Civil Service Commissions established maximum age limits has been in the statute since 1937. Iowa Code Ann. § 400.8 (Historical Note). The anti discrimination language, which does not include age, and the language concerning the prescription of reasonable rules relating to strength, agility were added by amendment in 1976. Id.

The Interpretation and Construction of Statutes:

23. In interpreting and construing Iowa Code section 400.8, or any other statute, the following principles must be remembered. The *interpretation* of a statute refers to determining the sense and meaning of the written text of the statute. BLACK'S LAW DICTIONARY 734 (5th ed. 1979). The construction of a statute refers to determining its legal effect. BLACK'S LAW DICTIONARY 283,734 (5th ed. 1979). It is the process of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions of a statute by reasoning in the light derived from extraneous connected circumstances or laws or writings bearing upon the

statute or a connected matter or by seeking and applying the probable aim and purpose of the provision. BLACK'S LAW DICTIONARY 283 (5th ed. 1979).

24. The polestar of all statutory construction is the search for the true intention of the legislature. Iowa National Industrial Loan Co. v. Iowa State, 224 N.W.2d 437, 439 (Iowa 1974). All other rules of construction are designed to reach this goal and may even be disregarded if necessary to fulfill the legislature's intent. Id. In ascertaining the intent of the legislature, where a statute is ambiguous, the following, as well as other matters, may be considered:

1. The object sought to be attained.

2. The circumstances under which the statute was enacted.

3. The legislative history.

4. The common law or former statutory provisions, including laws upon the same or similar subjects.

5. The consequences of a particular construction.

Iowa Code § 4.6.

25. In construing statutes, strained, impractical or absurd results should be avoided. Iowa National Industrial Loan Co. v. Iowa State, 224 N.W.2d at 440. "Ordinarily, the usual and ordinary meaning is to be given the language used, but the manifest intent of the legislature will prevail over the literal import of the words used." Id. "Where language is clear and plain, there **is** no room for construction." Id. "It is necessary to look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." Id. "All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion." Id.

26.

If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails.

Iowa Code § 4.8 (1991).

27.

If amendments to the same statute are enacted at the same or different sessions of the general assembly, one amendment without reference to the other, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment by the general assembly prevails.

Iowa Code § 4.11 (1991).

Iowa Code § 400.8 and Maximum Hiring Age Limits:

28. Respondents assert that this statute requires the enactment of maximum age hiring limits. Respondents' Brief at 52. While there is ambiguity in the statute, there is no language mandating any such requirement. The act does not state, for example, that "the commission shall enact maximum age limits" or that "the commission must enact maximum age limits." See Iowa Code §§ 4.1(36)(a)(b)(the word "shall" imposes a duty-the word "must" states a requirement). The statute also does not empower the commissions to enact such rules. It does not state, for example, that "the commission may enact maximum age limits." See Iowa Code § 4.1(36)(c)(the word "may" confers a power).

29. The statute does impose a duty requiring that the rules governing the examination process be prescribed and published in advance of the examination. Iowa Code § 400.8. If the commission has minimum and maximum age limits, they are to be included in the rules and prescribed and published at the same time as the remaining rules. Id. The statute insures that all such age limits are included in the examination rules and published. This statute forecloses any technical argument to the effect that age limits need not be published as they are not "examination rules."

30. The statute in force prior to the 1937 amendment required the holding of examinations "under such rules as [the civil service commission] may prescribe." Iowa Code Ann. § 400.8 (Historical Note)(quoting Iowa Code § 5696 (1935)). It made no mention of publication and posting of the rules nor of any age limits. Id. Because there is only a limited legislative history available in Iowa, it is impossible to know precisely why the statute was amended, but the legislature probably believed it was necessary that all potential applicants have access to the examination rules in advance of the test in order to prevent abuses of the examination process. Perhaps some applicants had not learned of unpublished age limits until after the examination process was over. Perhaps there was a suspicion that, without these safeguards, rules could be manipulated to pre-select favored candidates, a result contrary to the legislative intent that selection be based on ability. See Iowa Code § 400.8. Whatever the reason for the statute's amendment, considered either alone or in the context of chapter 400, it recognizes the existence of age limits, but does not require the establishment of age limits. Id.

31. The 1976 anti-discrimination amendment prohibits only discrimination on the bases of "height, weight, sex, or race in determining physical or mental ability of the applicant." Id. Respondents argue that the absence of age in this anti-discrimination language indicates continuing legislative approval of age limits. Respondents Brief at 52- 53.

32. It seems curious that the legislature would ban only these four bases for discrimination with respect to civil service positions when, in the previous year, it had already prohibited discrimination in civil service commission appointments on the basis of "political or religious opinions or affiliations, race, national origin, sex, or age." Iowa Code Ann. § 400.17 (Historical Note)(citing 1975 Iowa Acts ch. 200 §§ *4,* 5). Why the redundancy in again prohibiting sex and

race discrimination? Why ban discrimination on the bases of height and weight? Why specifically address determinations of physical and mental ability?

33. The interrelationship between sex and race, on the one hand, and height and weight standards, and tests of physical and mental ability, on the other hand, can be summed up in two words, "disparate impact." By 1976, the disparate impact theory of discrimination, one of the major theories of discrimination law, had been recognized by both the United States Supreme Court and the Iowa Supreme Court. Griggs v. Wilson Sinclair, 211 N.W.2d 133, 140 (Iowa **1973);** Griggs v. Duke Power Co., 401 U.S. 424 **(1971).** Under the disparate impact theory, practices which are evenly applied and are, therefore, "fair in form," but which tend to exclude minorities or women at a disproportionate rate are illegal unless they can be proven to be justified by business necessity, i.e. unless they can be shown to be job related. Hy-Vee Food Stores, Inc.

v. Iowa Civil Rights Commission, 453 N.W.2d 512,517, 18 (Iowa 1990).

34. By 1976, police departments, fire departments, and correctional institutions nationwide were involved in litigation where plaintiffs utilized the disparate impact theory to attack (1) height and weight standards on the basis of sex and race discrimination, e.g. Smith v. City of-East Cleveland, 363 F. Supp. 1131 (D.C. Ohio **1973**); EEOC Decision No. 71-1529 (**1971**); (2) physical ability tests on the basis of sex discrimination, e.g. Officers for Justice v. Civil Service Commission, 11 Empl. Prac. Dec. 10618 (D.C. Ca. **1975**), and (3) written mental ability tests on the basis of race discrimination, e.g. NAACP v. Civil Service Commission, 6 Empl. Prac. Dec. R 8956 (D.C. Ca. **1973**); NAACP v. Allen, 7 Empl. Prac. Dec. 9 9287 (5th Cir. **1974**).

35. It is more likely than not that the legislature enacted this anti-discrimination clause in order to emphasize the prohibition of this less obvious form of discrimination, see Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977), to end these discriminatory practices, and, not incidentally, to protect local governments from becoming liable for such practices. This clause does not signify any legislative tolerance of age discrimination.

36. This construction of Iowa Code section 400.8(l) is consistent with the rules of construction previously discussed. See Conclusions of Law No. 23-27. The legislature's intention in enacting 400.8 is not to institutionalize age discrimination but to ensure that selection of fire fighters and police officers is done fairly and on the basis of true measures of ability. This construction also harmonizes Iowa Code Section 400.8 and the anti-discrimination provision of Iowa Code Section 400.17, which provides:

A person shall not be appointed ... to ... a civil service position or in any other way favored or discriminated against in that position because of political or religious opinions or affiliations, race, national origin, sex, or age. However, the maximum age for a police officer or fire fighter covered by this chapter and employed for police duty or the duty of fighting fires is sixty-five years of age.

Iowa Code § 400.17 (1991) (emphasis added).

37. This provision prohibiting age discrimination in civil service appointments was enacted in 1976, 1976 Iowa Acts Ch. 1189 § 2, thirty-nine years after the enactment of the language in Iowa Code section 400.8 mentioning maximum age limits. 1937 Iowa Acts Ch. 56 § 7. The mandatory retirement age was enacted in 1979.1979 Iowa Acts Ch. 35 § 6.

38. By prohibiting an appointment to a civil service position or any other discrimination against a person with respect to that position "because of . . . age," the legislature essentially prohibited the use of age as a factor in the appointment process. See Price Waterhouse v. Hopkins, 490 U.S. 228,109 S. Ct. 1775, *104* L. Ed. 2d 268, 281-82 (1989)(discussion of "because of . . . sex"). While there are exceptions, as evidenced by the mandatory retirement age of 65, if section 400.8 were construed as either requiring local civil service commissions to set maximum age hiring limits or empowering them to do so, the prohibition in section 400.17 would be rendered meaningless. The maximum age limit provision of 400.8 and the prohibition against age discrimination in the appointment process of 400.17 would be irreconcilable. Iowa Code section 400.17 would prevail as it is the later enactment and it is listed later in the chapter than section 400.8. Iowa Code §§ 4.8, 4.1 (1991). See Conclusions of Law Nos. 26-27. Under the present construction of section 400.8, however, it is not necessary to reach this issue.

Ruling In the Alternative: If a Portion of Iowa Code Section 400.8 Actually Either Empowered or Required Civil Service Commissions to Establish Maximum Age Hiring Limits for Police Officers, the Anti-Discrimination Language of Iowa Code Section 400.17 Prevails Over It:

39. While, under the construction of section 400.8 set forth above, it is not necessary to reach this issue, the prevailing status of the anti-discrimination provision of Iowa Code section 400.17 over the maximum age limit provision of section 400.8 is adopted as a ruling in the alternative in the event it should later be determined that section 400.8 either mandates or empowers civil service commissions to set maximum age hiring limits. The reasoning for this alternative ruling is set forth in Conclusions of Law Nos. 37-38 above.

Iowa Code Section 411.6(l)(a), Which Establishes A Voluntary Retirement System for Law Enforcement Officers, Provides No Justification For Respondents' Maximum Age Hiring Limit:

40. Iowa Code Chapter 411 establishes and defines separate retirement systems for municipal police officers and firefighters appointed under the civil service laws of Iowa. It is undisputed that this chapter creates a voluntary, not a mandatory, retirement plan allowing police officers to retire once they have at least 22 years of service and have reached age 55. See Respondents Brief at 33 ("permits the early retirement"). See Finding of Fact No. 46.

41. Iowa Code Section 411.6(l)(a) provides:

411.6 Benefits.

1. Service retirement benefit. Retirement of a member on a service retirement allowance shall be made by each board of trustees as follows:

a. any member in service may retire upon application to board of police or fire trustees as the case may be, setting forth at what time, not less than thirty nor more than ninety days subsequent to the execution and filing of the application, the member desires to be retired. However, the member at the time specified for retirement shall have attained the age of fifty five and shall have served twenty-two years or more, and notwithstanding that, during the period of notification, the member may have separated from service.

Iowa Code § 411.6(l)(a)(1989)(emphasis added).

42. Respondents argue that this section demonstrates a legislative policy encouraging early retirement of police officers. They argue that they relied on this policy in establishing the not-yet-33 maximum age hiring limit, and that this reliance justifies this age limit under the Janesville case cited previously. Respondents' Brief at 33- 34, 37. See Conclusions of Law No. 20-21.

43. The Respondents' position is not tenable for several reasons. First, as noted in the Findings of Fact, the Respondents realized that this section does not encourage early retirement of police officers. See Finding of Fact No. 46 (citing the testimony of Commission Chairman Huntzinger at 1206).

44. Second, even if it were conceded that this statute did encourage early retirement of police officers, it does not expressly or impliedly mandate, permit or encourage cities to enact maximum age hiring limits. This statute cannot, therefore, be reasonably compared to the statute in Janesville which expressly allowed cities in Wisconsin to impose mandatory retirement plans. See Conclusion of Law No. 20.

45. Third, this section allows police officers, initially hired at age 33 or over, to receive full retirement after 22 years of service. Iowa Code Section 411.6(l)(a). An officer entering at age 40, for example, would be eligible to receive full retirement at age 63.

46. Fourth, this chapter allows police officers, who have been members of their retirement system for four or more years and whose employment terminated before retirement, for reasons other than death or disability, to receive a pro-rated service retirement allowance upon attaining retirement age. Iowa Code § 411.6(a)(2). It also permits police officers who have terminated their employment with one city and accepted employment with another city to "transfer membership service earned under the first system to the system under which the member is employed." Id. at 411.19.

47. These provisions are not consistent with any legislative encouragement of maximum age hiring limits. Section 411.6(a)(2) anticipates that some officers will leave employment prior to the end of their 22 years, an option which officers initially employed after the age of 33 might find attractive. Iowa Code § 411.6(a)(2). Section § 411.19 clearly anticipates that more experienced police officers, who will likely be older police officers, may choose to advance their careers by accepting new employment with other cities. Iowa Code § 411.19. Under this provision, they are not penalized by losing retirement credits when they make such a move Id.

48. Iowa Code Section 411.6(l)(a) does not embody any legislative policy encouraging the enactment of maximum age hiring limits by cities for police officer positions.

Respondents' Reliance on a 1980 Attorney General's Opinion Does Not Justify the Maximum Age Hiring Limit:

49. When discussing Attorney General opinions, it should be remembered that these opinions have never been held by any appellate court in Iowa to constitute controlling authority. They are only relied upon as persuasive authority by this Commission to the extent they are congruent with controlling authority and the factors set forth in the last sentence of Conclusion of Law No. 4 above.

50. The July 10, 1980 Attorney General's opinion referred to by Respondent is set forth in Respondents' Exhibit GG. The opinion was issued in response to a request by a legislator as to the legality of certain provisions utilized by the Mason City Civil Service Commission, including a minimum age limit of 21 years and a maximum age hiring limit of 30 years. 1980 Op. Att'y Gen. 751, 752. The opinion initially states that "the imposition of specified age limitations as employment criteria would not only contravene Chapter 601A, but also other provisions of the Iowa Code (1979)." Id.

51. The opinion applies the prohibitions against age discrimination set forth in the Iowa Civil Rights Act and the chapter on Civil Service. Id.. (quoting Iowa Code §§ 601 A.6(l) (a); 400.17 (1979). While discussing the maximum age hiring limit, this opinion makes reference to a prior 1973 opinion addressing this issue:

That opinion concluded that such limitations are permissible only if the nature of the particular position sought by the job applicant required an age limitation.

Id. at 753 (citing 1973 Op. Att'y Gen. 116).

52. The 1980 opinion continues:

Inasmuch as some positions in law enforcement agencies are essentially civilian in nature and would not require an age qualification, a rule automatically prohibiting older persons from applying for positions would be illegal. If the position cannot justify an age qualification by its very nature, it cannot be subjected to such a qualification without violating § 601A.6, The Code 1979.

Id. (emphasis added).

53. Respondents rely on the underlined sentence to support the proposition that "the Attorney General foresaw and countenanced that cities would be able to establish a maximum hiring cap as a bona fide occupational qualification necessitated by the business and occupation involved for its patrol officers, but not for those in its administrative positions." Respondents' Brief at 33. To the extent that this statement implies that merely showing that a position is a patrol officer position is sufficient to establish an age BFOQ, it is erroneous and is not consistent with either

the attorney general's opinions or, as shall be seen, with current law on this issue. Such civilian positions are merely offered in the 1980 opinion as examples of positions where age would not be a BFOQ.

54. The 1973 attorney general's opinion concluded that "the Iowa Civil Rights Act... does not permit age limits for entry into law enforcement positions unless the limit is based on the nature of the occupation."1973 0p. Att'y Gen.116,117.The opinion noted that this qualification may be likened to the BFOQ exception. Id. at 118. The 1973 opinion went on to state:

This essentially means that the Department of Public Safety must review the job description for each position under their authority and analyze whether the nature of that particular occupation requires a person under a certain age. Assumptions about the general abilities and physical qualifications of persons over a certain age are not permitted. Thus, if a particular position requires an employee of great agility, the department may not assume, for example, that persons over 50 lack this kind of agility. Further examples of this "nature of the occupation" exception are extremely difficult to conceive of when faced with . . . the prohibition against assumptions and generalizations.

Each applicant must normally be given the opportunity to prove that he or she possesses the qualities necessary for performance of the particular job, regardless of his or her age.

Id.

55. The 1973 opinion makes it clear that each position, not just administrative positions, must be analyzed to determine whether age is a BFOQ. Id. Under this opinion, precisely the kinds of stereotypical assumptions about the general abilities and physical qualifications of older officers relied on by Respondents in this case are prohibited. Id. See Findings of Fact Nos. 29-30. Finally, the opinion endorses testing ("the opportunity to prove that [one] possesses the qualities necessary for performance of the job") over maximum age hiring limits. Id.

56. In the 1980 opinion, the Attorney General chose to:

> adhere to the conclusion reached by the author of the 1973 opinion respecting the establishment of a maximum age for selection for employment [of police officers].... The establishment of such a rigid criterion will be subjected to close scrutiny in light of the policy of Chapter 601 A and § 400.17 forbidding discrimination in employment on the basis of age. Unless this criterion is justifiable as a bona fide occupational qualification or job related and necessary for the safe and efficient operation of the police . . . department, it will fail to pass muster under the statutes.

1980 Op. Att'y Gen. 751, 754.

57. The 1980 opinion also discussed the retirement system statute, Iowa Code section 411.6:

[In 1979], the legislature enacted an amendment to § 400.17, The Code 1979, establishing 65 years as the maximum age for..... police officers. . . . Further, § 411.6, The Code 1979,*allows*

police officers and firefighters who have attained 55 years of age to retire if they have served 22 years in their respective departments. Under this statute, it can be inferred that the collection of retirement benefits is dependent upon one's entry into the service at, at most 33 years of age, in order to serve 22 years in the department and retire at the minimum age of 55 years. However, **because this provision is not a hard and fast rule and is dependent upon both years of service and years of age, it appears this age delineation** would pass muster under challenge.
Id. (emphasis added).

58. Respondents argue that the underlined phrase would pass muster under challenge" refers to an age hiring cap such as the one it has established. Respondents' Brief at 34. However, examination of the remainder of that sentence, which is set forth in bold type, demonstrates that the "age delineation" referred to is a "provision [which] is not a hard and fast rule and is dependent upon both years of service and years of age." 1980 Op. Att'y Gen. 751, 754. The provision referred to is the one set forth in italics above, which summarizes the voluntary retirement provisions of Iowa Code section 411.6(l)(a) (1979), and not any maximum age hiring cap.

59. It should be noted that the inference set forth in this portion of the Attorney General's 1980 opinion is either incorrect or, at best, poorly stated. Collection of retirement benefits was not dependent upon entry into the police service at the age of 33 years at the latest. It is clear that, while age 55 is the earliest a police officer could collect full retirement benefits after 22 years of service, he or she could still draw full retirement benefits if 22 years of service were completed at a later age, such as 56 or 60. See Iowa Code § 411.6(l)(a) (1979). In 1979, a police officer could also collect pro-rated retirement benefits upon attaining retirement age if he or she had been a member of the retirement system for 15 or more years prior to termination of his or her employment. Id. Under the 1979 system, one could still be hired at age 49, terminate at the end of 15 years of employment, prior to mandatory retirement at age 65, and still be eligible to collect 15/22 of the retirement allowance. Iowa Code §§ 400.17, 411.6(l) (c) (1 979).

60. Under the 1989 code, one could still be hired at age 60, terminate at the end of 4 years of employment, prior to mandatory retirement at age 65, and still be eligible to collect 4/22 of the retirement allowance. Iowa Code §§ 400.17, 411.6(a)(2) (1989).

61. The 1980 Attorney General's Opinion concludes that:

The use of a maximum age limitation of 30 years as a device to sift out applicants for police officer ... positions will be subjected to close scrutiny. The department will be required to justify the use of that criterion by demonstrating a reasonable relationship exists between such an age limitation and the duties of the position of . . . police officer. However, because of the Legislature's inferential determination of an older age (i.e. 33 years) as sufficient to trigger the retention of retirement benefits, it may be argued that establishment of the lesser age as a selection criterion is in violation of the Legislature's intent.

1980 Op. Att'y Gen. 751, 754. (emphasis added).

62. Retirement benefits were and are retained under Chapter 411 for police officers newly hired at ages 33 and above. See Conclusions of Law Nos. 59-60. Under the inference drawn by the Attorney General, i.e. that the legislature's allowance of the retention of retirement benefits by newly hired police officers of a certain age demonstrates a legislative intent which is hostile to a prohibition against hiring police officers below that age, Respondents' maximum age hiring limit violates that intent. See 1980 Op. Att'y Gen. at 754. Also, linkage of an age hiring limit with entry into a retirement plan renders the plan, as implemented, a subterfuge for discrimination.See 1973 Op. Att'y Gen. 116,117.

63. Neither the 1973 nor the 1980 Attorney General Opinions support the Respondents' maximum age hiring limit.

Respondents Reliance on the "Silence" or Failure of the Iowa Civil Rights Commission to Reply to Their January 1986 Letter Provides No Justification for Their Maximum Age Hiring Limit:

Respondents Failed to Prove An Inference or Presumption that Their Letter Was Received by the Commission or by Kevin Pokorny.

64. As noted in the findings of fact, Respondents prepared a letter setting forth their position on the legality of the maximum age hiring limit. See Finding of Fact No. 49. On brief, Respondents argued, without citation of any supporting legal authority, that the failure of the Iowa Civil Rights Commission to respond to its letter constituted a "silence" which the Respondents were justified in relying on in maintaining its maximum age hiring limit. Respondents' Brief at 35-36.
65. "Proof of mailing a statement or letter properly addressed and otherwise conforming to postal laws and regulations concerning postage raises a presumption [or inference] of fact that it was received." Roshek Realty Company v. Roshek Brothers Company, 249 Iowa 349, 356, 87 N.W.2d 8 (1957). Respondents have not, however, presented evidence sufficient to support an inference or presumption that their letter was ever received either by the Commission or by Mr. Pokorny.

66. In order to establish such an inference, "it must be clearly shown" that each of the following facts actually exist:

(1) the necessary evidence of the contents and execution of the paper; (2) evidence that it was enclosed in a wrapper, or otherwise prepared for transmission through the mail; (3) evidence of the correct post-office address of the person to be charged with receiving it; (4) evidence that the package containing the document was properly addressed; (5) evidence that postage was prepaid; and (6) evidence that it was deposited in the mail for transmission.

Reserve Insurance Company v. Johnson, 260 Iowa 740, 744, 150 N.W.2d 632 (1967). These facts cannot be established thorough conclusory testimony to the effect that the letter was mailed from an office. See Forrest v Sovereign Camp W.O.W., 220 Iowa 478, 481, 261 N.W. 802 (1935); Central Trust Co. v. City of Des Moines, 205 Iowa 742, 746-47 (1928). As noted in the Findings of Fact, factors "(2)," "(4)," and "(5)," listed above have not been established. See Finding of Fact No. 51.

Even if Respondents' Letter Had Been Received, the Iowa Civil Rights Commission's Failure to Reply Would Not Constitute Evidence of Acquiescence In or Agreement With Respondents' Legal Position:

67. Respondents have failed to prove that their letter was received. Even if it had been, however, the Iowa Supreme Court has rejected the proposition that failure of an addressee to respond to a letter constitutes evidence of acquiescence in or agreement with the contents of the letter. Seevers v. Cleveland Coal Company, 158 Iowa 574, 594-95, 138 N.W. 793 (1913). "The mere fact that letters were received and unanswered has no tendency to show an acquiescence of the party in the facts stated in them. A party is not to be driven into a correspondence of that character to protect himself from such consequences." Id., 158 Iowa at 594. In some circumstances, such acquiescence may be inferred from silence in the face of verbal statements in the physical presence of the one who fails to respond, but not from a failure to respond to written communications. Id. at 594-95.

The Statements In Respondents' Letter Were Not of a Nature Which Would Ordinarily Call For a Denial

68. Even if Respondents' statements had been made verbally, and not in writing, the failure to respond would not constitute an admission or acquiescence by silence by the Commission with respect to Respondents' legal position, as stated in the letter, because these statements were not "of such a character and made under such conditions that a denial would have been natural had the statements been untrue or incorrect." Doherty v. Edwards, 227 Iowa 1264, 1272, 290 N.W. 672 (1940). Such statements would include, for example, allegations of wrong doing which would impose civil liability on the listener. Se Id. These are not the kind of statements found in respondents' letter.

Even if Respondents Had Proven Acquiescence by the Iowa Civil Rights Commission in Respondents Legal Position, This Would Constitute No Defense to An Allegation of Discrimination:

69. While Respondents have not proven any acquiescence by the Iowa Civil Rights Commission with respect to the legal positions stated in Respondents letter, even if they had done so, proof of such acquiescence would be no defense to a charge of discrimination. To -argue otherwise is to argue, in effect, that the state is equitably estopped by such acquiescence. The law is well established that there is no equitable estoppel against the state or public agencies. Sievertsen v. Employment Appeal Board, 483 N.W.2d 818, 819 (1992)(Dept. of Employment Services not estopped from recovering unemployment insurance benefits mistakenly paid claimant who followed erroneous advice of agency); City of Lamoni v. Livingston, 392 N.W.2d 506, 511 (Iowa 1986)(city which issued permit certifying property is zoned for intended use may later assert permit is invalid); Drainage District No. 119 v. City of Spencer, 268 N.W.2d 493, 504 (Iowa 1978)(City could not rely on I.D.O.T.'s assurances that it would help pay for culvert when there was no legal basis for I.D.O.T.'s liability-"[the city is] charged with knowledge of the law and could not ignore the plain meaning of the law."); Sullivan v. Iowa Departmental_ Hearing Board, 325 N.W.2d 923 (Iowa Ct. App. 1982)(suspension of liquor license upheld although

license holder established casino after relying on advice of Dept. of Revenue). *See also* Schwartz, Administrative Law § 3.18 (1984).

70. It is arguably possible that a declaratory ruling by this agency with respect to an age limit would be binding on the agency with respect to litigation between it and the party requesting the ruling because such rulings have the same final effect as "agency decisions or orders in contested cases." Iowa Code § 17A.9 (1991). Since no such declaratory ruling was sought in this case, it is not necessary to set forth the parameters of this possible defense. See Finding of Fact No. 54.

71. For the reasons set forth above, the alleged failure of the Iowa Civil Rights Commission to reply to City Attorney Forsyth's letter of January 16, 1986 does not constitute any defense to the allegations of discrimination in this case.

Respondents' Reliance on the Iowa Law Enforcement Academy (ILEA) Regulation at 501 IAC 2.3 (1988) Is No Defense to Any Allegation of Age Discrimination:

72. While there is no evidence that Respondents ever actually relied on the regulation set forth at 501 IAC 2.3 (1988), see Finding of Fact No. 55, they nonetheless assert, on brief, that such reliance justifies the maximum age hiring limit. The regulation states:

501-2.3 (80B) Higher standards not prohibited. While no law enforcement officer can be selected who does not meet requisite minimum requirements, they shall not limit or restrict law enforcement agencies in establishing additional recruitment standards.

501 IAC 2.3 (1988).

73. By its own terms, this rule merely allows law enforcement agencies to impose recruitment standards other those specifically listed in the "Minimum Standards For Iowa Law Enforcement Officers" set forth in detail in Chapter 2 of the ILEA rules. Id. This rule, which is simply an interpretation of ILEA standards, neither expressly nor impliedly authorizes nor even purports to authorize age discrimination, or any other form of discrimination, violative of the Iowa Civil Rights Act or Iowa Code section 400.17. While this administrative rule may not prohibit age discriminatory standards in the employment of police officers, the legislative enactments set forth in the Iowa Civil Rights Act and the Civil Service statute certainly do. Iowa Code SS 400.17, 601A.6 (1991). This rule is no defense to any allegation of age discrimination.

The Wide Discretion Allowed Civil Service Commissions In the Performance of their Lawful Duties Does Not Permit Them to Violate the Law Against Discrimination:

74. On brief, Respondents characterize this case as "an attack on the system of localized civil service which has been created by the Iowa legislature" and emphasize the wide discretion allowed civil service commissions in performing their duties. Respondents' Brief at 57-58. This complaint of age discrimination is not an attack on the system of localized civil service, but is entirely consistent with the legislature's express intent to prohibit age discrimination in the civil service appointment process, Iowa Code § 400.17, and with its general prohibition against age

discrimination in employment by, among others, political subdivisions of the State of Iowa. Iowa Code §§ 601A.2(6); 601A.2(10); 601A.6(l)(a)(c).

75. While it is true that civil service commissions have wide discretion in the performance of their duties, "agency action to be valid or legally permissible, must be within the legislative grant of authority." Patch v. Civil Service Commission of Des Moines, 295 N.W.2d 460, 464 (Iowa 1980). As previously discussed throughout this decision, none of the statutes, cited by Respondents as authorizing them to establish this maximum age hiring cap, actually provide such authority.

Respondents Have Not Proven Their "Based on the Nature of the Occupation" or "Bona Fide Occupational Qualification" (BFOQ) Affirmative Defense:

76. "[T]he 'unless based on the nature of the occupation' language of section 601A.6 is 'akin to the bona fide occupational qualification [BFOQ] exception present in the federal fair employment legislation.' " Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 168 (Iowa 1982)(quoting Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 492 (Iowa 1975)).

77. As with all their other affirmative defenses, see Conclusion of Law No. 6, the Respondents bear the burden of persuasion with respect to the BFOQ defense, i.e. they must persuade the finder of fact by the greater weight of the evidence that their maximum age hiring limit is based upon the nature of the occupation. See Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 492 (Iowa 1975); 2 H. Eglit, Age Discrimination, § 16.25 & n. 6 (1992). *See also* 161 IAC 8.15 (5)("[t]he burden shall be on the employer . . . to demonstrate that [a] direct . . . pre employment [age] inquiry is based upon a bona fide occupational qualification.").

78. Commission Rule 8.15(8) states, in relevant part:

8.15(8) Bona fide occupational qualifications.

a. An employer . . . may take any action otherwise prohibited under commission rules where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

b. The concept of bona fide occupational qualification is narrow in scope and will not be applied to include the mere preference or convenience of the employer.

161 IAC 8.15(8)(emphasis added).

79. The language in subsection (a) of this rule parallels the language describing the BFOQ exception in the Age Discrimination in Employment Act and Title VI I of the Civil Rights Act of 1964. 29 U.S.C. § 623(f) (1); 42 U.S.C. § 20OOe-2(e). The United States Supreme Court has held that "the BFOQ exception [in both of these Acts] 'was in fact meant to be an **extremely narrow**exception to the general prohibition of age [and other prohibited] discrimination... in

employment. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 412, 86 L.Ed. 2d 321, 332,105 S.Ct. 2743 (1985)(quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1 977)) (emphasis added).

80. "Since the BFOQ exception is contrary to the premise of the Iowa Civil Rights Act, it must be strictly construed." Polk County Juvenile Home v. Iowa Civil Rights Commission, 322 N.W.2d 913, 916 (Iowa Ct. App. 1982). "in order to justify the BFOQ exception, there must be no less restrictive alternative reasonably available to the employer." Id.

81. After noting that the BFOQ exception is read equally narrowly in both sex and age discrimination cases, the United States Supreme Court held that "[t]he wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. . . . where . . . discrimination is 'reasonably necessary' to the 'normal operation' of the 'particular' business." Auto Workers v. Johnson Controls, __ U.S. __ 55 Fair Empl. Prac. Cas. 365, 372 (1991). Each of these terms:

prevents the use of general subjective standards and favors an objective verifiable requirement. But the most telling term is "occupational"; this indicates that **these objective verifiable requirements must concern job-related skills and aptitudes**.... By modifying "qualification" with "occupational," **Congress narrowed the term to qualifications that affect an employee's ability to do the job.**

Id. (emphasis added).

82. Even in cases where the safety of third persons is part of the essence or central mission of the business, "the safety exception is limited to instances in which [age] actually interferes with the employees ability to perform the job." Id. at 373. As noted in the Findings of Fact, there were repeated admissions by Respondents' city attorney that establishment of the maximum age hiring limit was not tied to ability to do the job, but was instead based on Respondents' misinterpretations of Iowa Code section 400.8 and chapter 41 1. See Findings of Fact Nos. 57-58.

The "Rational Basis" and "Reasonableness" Standards Are Erroneous Standards For Determining Whether a Maximum Age Hiring Limit is a Bona Fide Occupational Qualification:

83. Respondents have relied on some cases applying legal standards which are inapplicable to BFOQ cases. Respondents suggested that:

In a case strikingly on point to the instant one, the U.S. District Court . . . in Arritt v. Grisell, 421 F. Supp. 800 (N.D. W. Va. 1976), granted the defendant-municipality's motion for summary judgment in an age discrimination action brought by an applicant for the municipal police force who was not permitted to test for the position because he was older than the city's age hiring cap of 35 years for police officers. The defendants were three members of the local police civil service commission.... The court was persuaded that the defendants had established that age was a [BFOQ] for the position of police officer . . . based entirely on the affidavit testimony of the chief of police who stated that he believed that the skills necessary for the job declined with Age, including the ability to engage in high speed chases, the ability to respond quickly and wisely in

emergency situations, and the ability to apprehend criminals by force. Id. at 802. Chief Paul Farber of the Estherville Police Department provided testimony which exactly duplicated that relied upon by the court in Arritt.

Respondents Brief at 26-27.

84. Respondents neglected to mention, however, that the District Court's BFOQ decision in Arritt v. Grisell was **reversed** by the Fourth Circuit Court of Appeals. Arritt v. Grisell, 567 F.2d 1267, 1271, 1272 (4th Cir. 1977). The district court was reversed because it relied on the incorrect standard set forth by the Seventh Circuit in Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974). Arritt, 567 F.2d at 1272. The Hodgson decision held that the employer must demonstrate only "that it has a rational basis in fact to believe that elimination of its minimum hiring age will increase the likelihood of harm to its passengers. [The employer] need only demonstrate ... a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy, might jeopardize the life of one more person than might otherwise occur under the present hiring practice." Hodgson at 863 (emphasis added).

85. The Fourth Circuit remanded the case back to the district court so it could apply the two pronged BFOQ standard set forth in Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976). It may safely be said that the Hodgson "rational basis in fact" standard began to die the day Tamiami Trails was decided, expired when it was repudiated by the Seventh Circuit, and received final interment when the Tamiami Trails standard was adopted by the United States Supreme Court in 1985. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 416-17 & n.26 (1985). The "rational basis in fact" standard is not the correct legal standard for determining whether a BFOQ exists. See Id.

86. Similarly, the Supreme Court rejected the suggestion that an employer's job qualifications are to be accepted when found to be "reasonable in light of safety risks." Id. at 419. Such management decisions are to be subjected to a test of objective justification. Id. "The BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness." Id. (emphasis added).

87. Two cases cited by Respondents, which applied the "rational basis" test as a constitutional standard when mandatory retirement programs were attacked as being violative of the Equal Protection Clause of the Fourteenth Amendment, are inapposite. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)(Respondents' Brief at 39-40); EEOC v. Michigan, 1988 WL 159174 at p. 10, 51 Fair Empl. Prac. Cas. 294 (W.D. Mich. 1988)(Respondents Brief at 2930, 34)(equal protection analysis of mandatory retirement statute and ADEA amendments under attack by intervenors).

88.

Murgia's equal protection analysis does not control our consideration of a statutory claim under the ADEA [or the Iowa Civil Rights Act]. Congress [and the Iowa state legislature] ha(ve) made a policy decision in protecting the rights of the aged. That policy may not be defeated by the deferential standard applied in an equal protection analysis.

EEOC v. County of Santa Barbara, 666 F.2d 373, 27 Fair Empl. Prac. Cas. 1481, 1484 n.8 (9th Cir. 1982).

The Legal Standards Suggested on Brief by Respondents When Discussing **Mandatory Retirement** Law Cases Are Neither the Correct Standards For Determining Whether a **Maximum Age Hiring Limit** is a Bona Fide Occupational Qualification Nor a Lawful Substitute for Bona Fide Occupational Qualification:

89. It should be noted that there are two key factual distinctions between this case and any case actually upholding a maximum age retirement limit which seriously degrade the persuasive value of such cases. First, under a mandatory retirement law, it can reasonably be anticipated that the employer will retain no patrol officers over the retirement age. Therefore, any safety-related problems which are anticipated from the retention of patrol officers over the mandatory retirement age will not occur due to the absence of those employees in the employer's workforce. With an age hiring cap, however, patrol officers will inevitably continue to age and the cap will provide no lasting protection against any anticipated safety problems thought to be related to age. Second, in this case Respondents relied on a voluntary retirement statute, Iowa Code Chapter 41 1, and their peculiar construction of that statute, and not on any mandatory retirement statute.

90. Respondents relied primarily on two mandatory retirement law cases, EEOC v. Michigan, 1988 WL 159174 at p. 10, 51 Fair-Empl. Prac. Cas. 294 (W.D. Mich. 1988) and EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980) for its position that "Respondents' use of an age criterion for hiring is supported by Federal case law upholding the use of mandatory age based retirement laws for law enforcement officers." (Respondents Brief at 28). Several deficiencies of reliance on the Janesville case have already been noted. See Conclusions of Law Nos. 20-21, 44. Some Federal courts have concluded, contrary to Janesville, that Federal anti-discrimination laws prevail over conflicting state laws. E.g. EEOC v. County of Santa Barbara, 666 F.2d 373, 27 Fair Empl. Prac. Cas. 1481, 1485 & n.15 (9th Cir. 1982).

91. In EEOC v. Michigan, the District Court did not uphold the use of mandatory age-based retirement laws for law enforcement officers." The EEOC and the State of Michigan had entered into a consent decree barring enforcement of Michigan's mandatory retirement law for police officers. EEOC v. Michigan, 1988 WL 159174 at p. 1. The decree provided that, in the event the EEOC created an exemption for such plan under the ADEA, the State of Michigan would be free to apply to the court for revision of the decree. Id. at 1-2. After enactment of a new mandatory retirement law, and the ADEA 1986 amendments, the State of Michigan applied for a revision of the decree to allow it to implement the new mandatory retirement law. Id. at 2-4. A number of police officers intervened to oppose revision of the decree and reinstitution of mandatory retirement requirements by contending that these requirements and the ADEA amendments violated the Equal Protection Clause. Id. at 1, 10. The State of Michigan's motion to modify the decree and reimpose mandatory retirement was ' denied. Id. at 10. The intervenors' Equal Protection challenge was also denied under the rational basis standard which, as previously noted, has no relevance to the BFOQ inquiry. Id. at 11.

92. Respondents, relying on the 1986 amendments to the ADEA, which are quoted in EEOC v. Michigan, stated, on brief, that "[s]aid language can correctly be interpreted as requiring of cities less of a showing of a BFOQ if their age based hiring is pursuant to a legitimate retirement plan." Respondents' Brief at 32. This is precisely the opposite of what the court actually held. The court, relying on EEOC regulations, ,held that, under the 1986 amendments, "the BFOQ standards have not been dropped vis-a-vis firefighters and law enforcement officers." EEOC v. Michigan, 1988 WL 159174 at p. 9. Also, the ADEA 1986 amendments, being contrary to Iowa Civil Rights Act, which offers greater protection than the ADEA, have no persuasive or controlling authority with respect to the Act. See paragraphs 13 and 14 - Rulings on Objections to Evidence.

The Correct Legal Standards for Determining Whether Respondents Have Established A Bona Fide Occupational Qualification for Its Maximum Age Hiring Limit Are Those Set Forth in the**Polk County Juvenile Home** and **Criswell** Cases:

93. The Iowa Supreme Court has has not set forth an extensive discussion of the analytical framework applicable to the determination of whether an employer has established a bona fide Occupational qualification for an employment requirement. The essential principle, however, is that a BFOQ cannot be established unless there is "no less restrictive alternative reasonably available to the employer." Polk County Juvenile Home v. Iowa Civil Rights Commission, 322 N.W.2d 913, 916 (Iowa Ct. App. 1982)(child care worker in county juvenile home). The employer must "demonstrate that there are no reasonably available alternative practices with less discriminatory impact that would satisfy the legitimate needs of the [employer]." Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir. 1980)(cited in Polk County Juvenile Home at 916)(corrections officer position in prison).

94. This requirement is congruent with that set forth in an EEOC regulation quoted with approval by the United States Supreme Court in Western Air Lines, Inc. v. Criswell:

If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 & n-24 (1985) (quoting 29 C.F.R. S 1625.6(b)). *See also* EEOC v. Michigan, 1988 WL 159174 at p. 9, 51 Fair Empl. Prac. Cas. 294 (W.D. Mich. 1988).

95. The analytical framework for determining whether an employment requirement is a BFOQ is explicated in the Criswell decision. This analytical framework is a refinement of that given in Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976). Criswell at 412-417. Given the close relationship between treatment of the BFOQ defense under both Iowa and federal law, e.g. Foods, Inc. 318 N.W.2d at 168, this framework, **as set forth in Criswell,** is persuasive and is applicable to BFOQ analysis under the Iowa Civil Rights Act. See Hulme v. Barreft, 449 N.W.2d 629, 631 (Iowa 1989)(lowa courts may rely on analytical framework set forth in federal cases); Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862,866-67 (Iowa 1978)(United States Supreme Court decisions often entitled to great deference). It must,

however, be applied in a manner consistent with the controlling authority requiring that the employer establish there is no reasonably available, less restrictive alternative to the employer's age requirement. Polk County Juvenile Home v. Iowa Civil Rights Commission, 322 N.W.2d 913,916 (Iowa Ct. App. 1982).

96. The Criswell analytical framework is a two part test, which is based on the principle that, while age "may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business," the ultimate determination of whether age is a BFOQ must be made on an individual "case-by-case" basis due to "[t]he diverse employment situations in various industries." Criswell at 411, 416-17, 422. The evidentiary record in each case must be analyzed to ascertain whether the employer has made the necessary " 'particularized factual showing' with respect to each element of the BFOQ defense." EEOC v. Pennslyvania, 768 F.2d 514, 39 Fair Empl. Prac. Cas. 591 (3rd Cir. 1985)(citing Johnson v. Mayor of Baltimore, 472 U.S. 353, 37 Fair Empl. Prac. Cas. 1839, 1842 (1985)).

97. Under the first test, the finder of fact must determine whether the job qualifications, for which the employer is using age as a proxy, are essential to the central mission of the employer. Criswell at 413 & n.18. This inquiry is made because these "qualifications may be so peripheral to the central mission of the employer's business that no discrimination can be 'reasonably*necessary* to the normal operation of the particular business.' " Id.

98. In the Diaz case, for example, the Fifth Circuit considered the employer's argument that being a member of the female sex was a BFOQ for the position of flight attendant because females could provide a "cosmetic effect" and "pleasant environment" which males could not. Id. at n.18 (discussing Diaz v. Pan American World Airways, Inc. 442 F.2d 385 (5th Cir. 1971)). This argument was properly rejected because these functions were not essential to the business of providing safe transportation for passengers. Id.

99. In the instant case, Respondents established that the abilities necessary to perform certain functions were job qualifications which were reasonably necessary to the normal operation of the police department because these functions were shown to be essential to the central mission of the Estherville Police Department. See Finding of Fact No. 59.

100. Although there is authority supporting the proposition that the Respondents' failure to have any monitoring or testing program for police officers, to measure their ongoing physical capabilities or to assess their risk of heart attack, automatically precludes any finding that such qualifications are reasonably necessary to the business, see EEOC v. Mississippi State Tax Commission, 873 F.2d 97, 49 Fair Empl. Prac. Cas. 1393,1394 (5th Cir. 1989)(citing e.g. EEOC v. Commonwealth of Pennsylvania, 829 F.2d 392, 395, 44 Fair Empl. Prac. Cas. 1470 (3rd Cir. 1987)), the more persuasive position is:

that physical fitness may be a job qualification despite the lack of formal standards. The weight to be given the-existence or absence of formal standards is for the fact finder to decide, with. its finding subject to appropriate appellate review on the entire record. The Criswell opinion emphasizes the importance of fact finding on a "case by case" basis under the ADEA structure.

Id. Once the Respondents established that these functions were actually performed, and were essential to the normal operations of the department, it followed that the physical ability and capability to perform these functions were qualifications reasonably necessary to the normal operation of the police department. The absence of formal standards with respect to monitoring and maintaining the health and physical fitness of police officers is of greater importance to the resolution of the second BFOQ test.

101. Once the first part of the BFOQ test has been established, the employer must show that its reliance on age as a proxy for job-related qualifications is more than fair, reasonable or convenient. Criswell at 414. The age requirement "must be 'reasonably necessary . . . to the particular business,' and this is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first [test]." Id. This showing required for the second part of the BFOQ test may be met in either of two ways: First, "[t]he employer could establish that it ... had reasonable cause to believe, that is, a factual basis for believing that all or substantially all (persons over the age qualification] would be unable to perform safely and efficiently the duties of the job involved." Id. Respondents did not establish that the age requirement was reasonably necessary through this method. See Findings of Facts Nos. 60-67. On brief, they did not even address the issue.

102. The second method for "establish[ing] that age was a legitimate proxy for the safety-related job qualifications [is] by proving that it is 'impossible or highly impractical' to deal with older employees on an individualized basis." Criswell at 414. It is at this point that the considerations set forth in Polk County Juvenile Home and the EEOC regulation cited in Criswell come into play. See Conclusions of Law Nos. 93-95. Respondents have failed to prove by a preponderance of the evidence each and all of the elements necessary to show, by this method, that the age requirement is reasonably necessary to the operation of the Estherville Police Department.

103. Respondents have failed to prove that the not-yet-age 33 at time of appointment maximum age hiring limit effectuates their public safety goals of ensuring that the police force will consist of physically fit police officers who are without an increased risk of heart or other chronic disease and are, therefore, physically able to perform the essential functions identified as reasons for the age cap. Criswell at 416 & n.24 (quoting 29 C.F.R. S 1625.6(b)). See Findings of Fact Nos. 6972, 78, 82-83, 84-98, 106. Important to the determination of whether the maximum age hiring limit is 11 I reasonably necessary' to safe operation of the [department]" is proof "establishing that a job [age] qualification has-been carefully formulated to respond to documented concerns for public safety," although risks need not and cannot be "establish[ed) to a certainty." Criswell at 419.(emphasis added). Such proof was lacking here. See Findings of Fact Nos. 83, 87-92.

104. Respondents have failed to prove there are no reasonably available acceptable alternatives to the age requirement. Polk County Juvenile Home at 916; Criswell at 416 & n-24 (quoting 29 C.F.R. S 1625.6(b)). See Findings of Fact Nos. 73-82, 99-106. It should be noted that, although cost-effective measures for monitoring and assessing physical capabilities and the risk of heart disease are mentioned in the findings of fact, it is well established law that "[e]conomic considerations cannot be a basis for a BFOQ-precisely those considerations were among the targets of the Act." EEOC v. County of Los Angeles, 706 F.2d 1039, 1042 (1983)(quoting

Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981)); H. Eglit, Age Discrimination, § 16.30A & n.7 (1992). "[A]dded expense [which] would be incurred by individualized dispositions of employment applications ... is insufficient to meet the employer's burden." Usery v. Tamiami Trail Tours, 531 F.2d 224, 235 n.26 (5th Cir. 1976). Cf. Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 180 (Iowa App. 1988)("Economic savings derived from discharging older employees cannot serve as a legitimate justification"). See Findings of Fact Nos. 79-81, 102.

105. In determining whether employers have established that it is highly impractical to test employees on an individualized basis, it is not required that any alternative tests be perfect, e.g. that they effectively screen out all persons with heart disease. EEOC v. County of Los Angeles, 706 F.2d 1039, 1043 (1983). The employer must demonstrate not that the alternative tests are imperfect, or fail to screen out a small percentage of unqualified persons, but that they fail to make a "practical reliable differentiation of the unqualified from the qualified applicant." Id. In this case, the employer has failed to generate the quantum of credible evidence necessary to support such a conclusion. See Findings of Fact Nos. 88-92, 102.

106. Respondents have failed to demonstrate that the reasonably available acceptable alternatives to the maximum age hiring cap neither better advance Respondents' public safety goals nor equally advance them with less discriminatory impact. Polk County Juvenile Home at 916 ("less restrictive alternative); Criswell at 416 & n.24 (citing 29 C.F.R. S 1625.6(b)). See Findings of Fact Nos. 66, 75-83, 88-102.

107. Based solely on the objective evidence, and disregarding any evidence of Respondents' subjective intent in creating the age cap, Respondents have failed to establish a BFOQ for their maximum age hiring limit. See Conclusion of Law No. 81. See Findings of Fact Nos. 59-106.

EEOC v. Missouri State Highway Patrol Is Neither Governing Nor Persuasive Authority In This Case:

108. On brief, Respondents rely heavily on a pre Criswell Eighth Circuit case EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984) which upheld a 32 age cap for state troopers as a BFOQ under the ADEA. Respondents Brief at 20-25. Despite Respondents' assertion to the contrary, this case is not "governing law here" for the reasons set forth in Conclusion of Law No. 4. Respondents Reply Brief at 6. In addition, the Iowa Supreme Court has held that, "a U.S. circuit court's interpretation of federal law is, of course, binding on neither an Iowa agency nor this court. Such opinions can, however, provide very persuasive authority on questions in controversy. . .. . [The agency relied on a Seventh Circuit opinion.] The fact that the authority came from the Seventh Circuit, instead of the Eighth, is immaterial." Boswell v. Iowa Board of Veterinary Medicine, 477 N.W.2d 366, 370 (Iowa 1991).

109. EEOC v. Missouri State Highway Patrol is also not persuasive authority in this case. The case was heard by a three judge panel with one judge filing a separate decision which concurred in part and dissented in part. Missouri at 448, 457 (McMillian, J, dissenting). The majority's opinion in Missouri State Highway Patrol has been subjected to justified criticism. The Fifth Circuit noted that its analysis is confusing because of the Eighth Circuit's simultaneous treatment

of both parts of the BFOQ test. EEOC v. Mississippi State Tax Commission, 873 F.2d 97, 49 Fair Empl. Prac. Cas. 1393, 1395 (5th Cir. 1989). This treatment is contrary to the analytical framework subsequently explicated in Criswell and followed here.

110. The majority opinion was also criticized by the dissent because of the Court's excessive reliance on principles of federalism and deference to the state legislatures' judgment. Id. at 457-58 (McMillian, J, dissenting). It should be noted, however, that principles of federalism do not concern us here. Also, the legislative judgments in this case are in opposition to, not support of the hiring cap. Iowa Code §§ 400.17; 601A.6. The Eighth Circuit also found mandatory retirement and hiring age limits established by Congress for federal law enforcement positions to be persuasive without evidence that Congress established them as BFOQS, a position rejected by other circuits, as noted in the dissent, Missouri at 458, and ultimately repudiated by the United States Supreme Court. Johnson v. Mayor of Baltimore, 472 U.S. 353, 37 Fair Empl. Prac. Cas. 1839, 1845-46 (1985).

111. Finally, much unlike the instant case, the plaintiffs in Missouri made "efforts, which at best can be described as minimal, to rebut the patrol's..... [BFOQ] showing." Missouri at 457. Missouri is not persuasive authority.

Laches:

112. Respondents assert, on brief, that they are entitled to judgment on the basis of laches. Respondents' Brief at 60-61. As a matter of law, Respondents have waived any laches defense or other defense based on any alleged delay by the Commission because they failed to raise the issue until after the evidentiary hearing was completed. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 169-70 (Iowa 1982). See Finding of Fact No. 107.

113. In any event, "the equitable doctrine of lachee relates to delay in the assertion or prosecution of a claim, working to the disadvantage or prejudice of another. The doctrine is applied only where it would be inequitable to allow a person making a belated claim to prevail .... Laches consists of unreasonable delay in asserting rights which cause another undue prejudice. Mere passage of time is not enough to establish laches. Each case is governed chiefly by its own circumstances." Brewer v. State 446 N.W.2d 803, 805 (Iowa 1989)(emphasis added)(citations omitted). "[It] is an affirmative defense which must be established by clear, convincing, and satisfactory proof.... It is available only when delay has harmed the claimant or caused material prejudice." Chicago, Rock Island, and Pacific Railroad Company v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980).

114. Prejudice is one of the elements of laches which must be shown by evidence in the record. C.O.P.E.C. v. Wunschel, 461 N.W.2d 840, 846 (Iowa 1990). See 27 Am. Jur. 2d *Equity* 162 (1966). "Prejudice must be shown.... Prejudice 'cannot be inferred merely from the passage of time.'" C.O.P.E.C. v. Wunschel, 461 N.W.2d 840, 846 (Iowa 1990)(quoting with approval Cullinan v. Cullinan, 226 N.W.2d 33,36 (Iowa 1976)). See e.g. Brewer v. State, 446 N.W.2d 803, 805 (Iowa 1989)(mere passage of time does not demonstrate unreasonable delay in asserting rights which cause another prejudice).

115. Respondents have introduced no evidence to support these arguments. Argument by counsel on brief is no substitute for evidence in the record. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d 207, 216 n.9 (1981)(burden of production of evidence cannot be met through argument of counsel). Given the failure of Respondents to show prejudice, they have failed to prove any laches defense.

116. It should be noted that the Eighth Circuit case cited by Respondents for the proposition that agencies have a duty to decide issues within a reasonable time is concerned with a specific federal statutory provision, governing federal administrative agencies, which has no state counterpart. EEOC v. Liberty Loan Corp., 584 F.2d 853, 854 (8th Cir. 1978).

Business Necessity:

117. Respondents attempted to articulate a business necessity defense for their facially discriminatory policy. Respondents' Brief at 17. An explicit age-based discriminatory policy is analyzed under the disparate treatment theory of discrimination and not the disparate impact theory. Therefore, the business necessity defense does not apply to this case. Auto Workers v. Johnson Controls, __ U.S.__ 55 Fair Empl. Prac. Cas. 365, 371- 72 (1991). See Conclusion of Law Nos. 33-34.

Remedies:

118. Violation of Iowa Code section 601 A.6 having been established, the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code 601A.15(8) (1989). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "An appropriate remedial order should close off 'untraveled roads' to the illicit end and not ,only the worn one.' " Id. at 771.

Compensatory Damages:

119. The Iowa Civil Rights Act gives the Commission the authority to award actual or compensatory damages, which are designed to make whole the complainant for any actual or real losses he suffered as a result of discrimination by Respondents. Iowa Code S 601A.15(8)(a)(8)(1991). See Chauffers, Teamsters and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986). This would include the loss on sale of Complainant Montz house and moving expenses. See Finding of Fact Nos. 145, 147.

Mitigation of Backpay Damages:

120. The Respondent bears the burden of proof for establishing any failure of the Complainant to mitigate damages. Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478,481 (Iowa Ct. App. 1990). "Mitigation is based upon the complainant's receipt of unemployment benefits and other earned income after the wrongful termination." Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). In

order to meet its burden of proving that Complainant failed to mitigate his damages, Respondent must establish:

(1) that the damage suffered by [the employee] could have been avoided, i.e. that there were suitable positions which [the employee] could have discovered and for which he was qualified; and (2) that [the employee) failed to use reasonable care and diligence in seeking such a position.

. . .

"[R]easonable care and diligence [does not mean] that the... employee is required to make every effort to find employment. A claimant is only required to make every reasonable effort to mitigate damages and is not held to the highest standard of diligence. (citations omitted).
Moreover, a finding of diligence is not a condition precedent to an award of back pay. It is [the employer] not [the employee] who bears the burden of establishing that the claimant willfully failed to mitigate damages and this burden is not met merely by showing that further actions could have been taken in the pursuit of employment. "Rather, the [employer] must show that the course of conduct (employee] actually followed was so deficient as to constitute an unreasonable failure to seek employment." (citation omitted).

In summary, diligence in mitigating damages within the employment discrimination context does not require every effort and it is [the employer], not a claimant, who has the burden of establishing, that the claimant failed to make an honest, good faith effort to secure employment.
Id.

121. Respondent failed to establish that Complainant Montz did not make an "honest, good faith effort" to obtain work. Id. Complainant Montz was not required to seek work outside the City of Estherville, which was intended to be his permanent community, where his wife worked, and where he cared for his ill mother, in order to mitigate his damages. Coleman v. City of Omaha, 714 F.2d 804, 33 Fair Empl. Prac. Cas. 1462, 1464 (8th Cir. 1983)(former police chief not required to leave community to take out-of-town police chief jobs to mitigate damages); Hegler v. Board of Education, 447 F.2d 1078, 1081, 3 Fair Empl. Prac. Cas. 1212, 1214 (8th Cir. 1971)(plaintiff not required to abandon community where spouse worked and seek employment in another state). See Findings of Fact Nos. 131-32.

Backpay Compensation:

122. The Commission has the authority to make awards of backpay. Iowa Code 601A.15(8)(a)(1) (1989). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id., The Complainant bears the burden of proof in establishing his or her damages. Diane Humburd, 10 Iowa Civil Rights Commission Case Rpts. 1, 9 (1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). See Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Diane Humburd at 10 (citing e.g. EEOC v. Kalfir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), *affd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied,* 434 U.S. 920 (1977)). Backpay may include compensation for life, health and other employer

paid insurance. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 536 (2nd ed. 1989). This the Complainant has done. See Findings of Fact No. 139-42.

123. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant rests with the Respondent. Diane Humburd at 10 (citing Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). See Findings of Fact Nos. 143-44. "The back pay period may... be terminated when the [complainant] ceases to look for.alternative employment." Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 531 (2nd ed. 1989)(emphasis added). There is no evidence of any such cessation of a reasonable work search here. See Findings of Fact Nos. 131-33, 135-37. "[A] back pay period terminates when the [complainant] obtains comparable employment." Id. This period has been terminated at that point. See Finding of Fact No. 138.

124. The award of backpay in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a backpay award . . . provide[s] the spur or catalyst which causes employers and unions to self-examine and to selfevaluate their employment practices and to endeavor to eliminate (employment discrimination]." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, backpay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of backpay in the present case.

125. "Iowa Code section 601A.15(8) gives the Commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 531 (Iowa 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Id. at 530-531. "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531 (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

Damages for Emotional Distress:

126. In accordance with the statutory authority to award actual damages, the Iowa Civil Rights Commission has the power to award damages as compensation for emotional distress sustained as a result of discrimination. Chauffeurs Local Union 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986)(interpreting Iowa Code 601A.15(8)). The following principles were applied in determining whether an award of damages for emotional distress should be made and the amount of such award.

Proof of Emotional Distress:

127. "[A] civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990). "Humiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836, 845 (Iowa 1980)).

128. Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of distress. See Dickerson v. Young, 332 N.W.2d 93,98-99 (Iowa 1983). Testimony of the complainant alone may be sufficient to prove emotional distress damages in discrimination cases. See Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977; Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. S 15388 (N.D. Ill. 1981).

129. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, such evidence in the record may be considered when assessing the existence or extent of emotional distress. See Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988).

130. On brief, Respondents argued that "the Iowa Supreme Court has held that the Respondent's action must not only be causation in fact, but be the proximate cause of that claimed emotional distress" and that Complainant Montz had not proven that his distress was proximately caused by the discrimination he suffered. Respondents Brief at 65 (citing Hy-Vee Food Stores v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990)). "Any injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission." BLACK'S LAW DICTIONARY 1103 (5th ed. 1979).

131. In Hy-Vee, the Court relied, in part, on complainant's testimony that "[s]he was upset, felt bad, and had headaches. At one point she described her reaction to the stress she was experiencing: 'I would like to have a bag to beat it up, punch it in.'" Hy-Vee at 526. In light of the standards set forth above, and of Complainant Montz' testimony and other credible evidence of emotional distress, it is-clear that any proximate causation standard implied by Hy-Vee has been met. See Findings of Fact Nos. 148-56.

Determining the Amount of Damages for Emotional Distress:

132.

Because compensatory damage awards for mental distress are designed to compensate a victim of discrimination for an intangible injury, determining the amount to be awarded for that injury is a difficult task. As one court has suggested, "compensation for damages on account of injuries of

this nature is, of course, incapable of yardstick measurement. it is impossible to lay down any definite rule for measuring such damages."

. . .

Computing the dollar amount to be awarded is a function of the finder of fact. Juries and judges have been making such decisions for years without minimums or maximums, based on the facts of the case [and] the evidence presented on the issue of mental distress.

2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(quoting Randall v. Cowlitz Amusements, 76 P.2d 1017 (Wash. 1938)).

133. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Torts 905). " 'In determining this, all relevant circumstances are considered, including sex, age, condition of life, and any other fact indicating the susceptibility of the injured person to this type of harm.' And continuing 'The extent and duration of emotional distress produced by the tortious conduct depend upon the sensitiveness of the injured person.' " Id. (quoting Restatement of Torts 905). See also Restatement (Second) of Torts 905 (comment i).

134. A wrongdoer takes the person he injures as he finds him. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975). A previously disabled person injured by the acts of a wrongdoer "is entitled to such increased damages as are the natural and proximate result of the wrongful act." Id. at 46; Keeton, Prosser and Keeton on the Law of Torts 292 (1984). This principle applies to psychological and emotional injuries. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975).

135. On the other hand, the wrongdoer is not required to pay damages for emotional distress resulting from sources completely independent of its conduct. See Keeton, Prosser and Keeton on the Law of Torts 292, 345, 348-50 (1984). Cf. Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990)(upholding award of emotional distress damages in sexual harassment case against appeal of damages as inadequate-noting some distress due to other turmoil in complainant's life unrelated to discriminatory actions of employer). With items such as pain and suffering, where the extent of the harm is almost incapable of definite proof, the factfinder is granted wide latitude in determining what amount of damage is attributable to the wrongdoer despite the absence of specific proof. Keeton, Prosser and Keeton on the Law of Torts 348- 350 & nn.47, 49 (1984)

Interest:

Pre-Judgment Interest:

136. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code 601A.15(8)(a)(8). Pre-judgment interest is a form of damages. Dobbs, Hornbook on Remedies 164 (1973). It "is allowed to repay the lost value of the

use of the money awarded and to prevent persons obligated to pay money to another from profiting through delay in litigation." Landals v. Rolfes Company, 454 N.W.2d 891, 898 (Iowa 1990). Prejudgment interest is properly awarded on an ascertainable claim. Dobbs, Hornbook on Remedies 16667 (1973). Because the amount of back pay due Complainant at any given time has been an ascertainable claim since he was denied-employment, prejudgment interest should be awarded on the back pay. Such interest should run from the date on which back pay would have been paid if there were no discrimination. Hunter v. Allis Chalmers Corp., 797 F.2d 1417, 1425-26 (7th Cir. 1986)(common law rule). The method of computing pre-judgment interest is left to the reasonable discretion of the Commission. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 543 (2nd ed. 1989). No pre-judgment interest is awarded on emotional distress damages because these are not ascertainable before a final judgment. See Dobbs, Hornbook on Remedies 165 (1973).

Post-Judgment Interest.,

137. Post-judgment interest is usually awarded upon almost all money judgments, including judgments for emotional distress damages. Dobbs, Hornbook on Remedies 164 (1973).

Attorneys Fees:

138. The Complainant having prevailed, he is entitled to an award of reasonable attorney's fees. Iowa Code 601A.15(8)(1989). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must expressly retain jurisdiction of the case in order to determine the actual amount of attorney's fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839 (Iowa 1984).

139. Respondents have suggested that Complainant be denied an award of attorney's fees because of the conduct of his counsel at hearing. Respondents' Brief at 72. Whatever impact his counsel's behavior might or might not have on the award of fees to the Complainant should be determined after the evidentiary hearing on fees required by Ayala. However, both Respondents' and Complainant's counsel are reminded of the following provisions of the Code of Professional Responsibility, which apply to administrative hearings under EC 7-15, and are admonished to follow them during the course of any future evidentiary hearing before this agency:

A. Disciplinary Rule 7-106 Trial Conduct.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . .

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

. . .

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

B. Ethical Consideration 7-36.

Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears.

C. Ethical Consideration 7-37.

[I]11 feeling [between clients] should not influence a lawyer in his conduct, demeanor, and attitude towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

D. Ethical Consideration 7-38.

A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client.

E. Ethical Consideration 7-10.

The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

Iowa Code of Professional Responsibility for Lawyers. Credibility, Testimony, and Expert Opinions:

140. In addition to the factors mentioned in the section entitled "Course of Proceedings" and in the findings on credibility in the Findings of Fact, the Administrative Law Judge has been guided by the following two principles: First, "[w]hen the trier of fact ... finds that any witness has willfully testified falsely to any, material matter, it should take that fact into consideration in determining what credit, if any, is to be given to the rest of his testimony." Arthur Elevator Company v. Grove,236 N.W.2d 383,388 (Iowa 1975). "[I]n the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337 U.S. 656, 659 (1949) (rejecting proposition that consistently crediting witnesses of one party and discrediting those of the other indicates bias). Second, "[t]he trier of facts may not totally disregard evidence but it has the duty to weigh the evidence and determine the credibility of witnesses. Stated otherwise, the trier of facts... is not bound to accept testimony as true because it is not contradicted. In Re Boyd, 200 N.W.2d 845, 851-52 (Iowa 1972).

141. In Iowa, expert opinion evidence may be accepted as conclusive by the trier of fact either "in whole, in part, or not at all." State v. Nunn, 356 N.W.2d 601, 604 (Iowa Ct. App. 1984).

142.

The acceptance or rejection of opinion evidence does not depend upon the expert's abstract qualifications alone. Bernal v. Berhardt, 180 N.W..2d 437 (Iowa 1970). Such an opinion must necessarily be tested by the specific facts upon which it is based, stated by the witness or stated in a hypothetical question. Albrecht v. Rausch, 193 N.W.2d 492 (Iowa 1972). We have said an expert's opinion rises no higher than the level of evidence and logic on which it is predicated. In re Springer's Estate, 252 Iowa 1220, 110 N.W.2d 380 (1961). Even if uncontroverted, expert opinion testimony is not binding on the trier of fact; it may be accepted in whole, in part, or not at all. Olson v. Katz, 201 N.W.2d 478 (Iowa 1972).

Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133, 142 (Iowa 1973).

143. In Wilson-Sinclair, the opinion of an expert witness, an industrial psychologist, as to the discriminatory impact of a test was rejected by the court, in part, because he "advanced no empirical studies or experiences involving this standard test to substantiate his opinion as it related to the case before us." Id. In this case, Dr. Moe's opinions and conclusions were found to be credible, in part, because they were well-supported by refereed empirical medical studies. See Finding of Fact No. 163. Such studies may be relied on by a finder of fact when they are admitted in evidence. See Id. at 141. Some of Dr. Hranac's and Dr. Muchinsky's opinions, on the other hand, lacked sufficient supporting data. See Findings of Fact Nos. 169, 171, 175.

144. Other factors which may be considered when determining the credibility of expert witnesses include, but are certainly not limited to, failure to perform analyses normally performed by an expert to achieve a reliable opinion, board certification (or the lack of it), and financial interest. *See e.g.* Mauet, Fundamentals of Trial Techniques, 289-90 (1980).

145. The United States Supreme Court rejected the proposition that "where qualified experts disagree as to whether persons over a certain age can be dealt on an individual basis, an employer must be allowed to resolve that controversy in a conservative manner." Criswell at 423. "This argument incorrectly assumes that all expert opinion is entitled to equal weight, and virtually ignores the function of the trier of fact in evaluating conflicting testimony." Id. Such a rule would "give free reign to the stereotype of older workers." Id. In the light of the evidence in the record of reasonably available, less restrictive, practical alternatives to age discrimination, "[any] attempt to justify [the employer's] decision on the basis of the contrary opinion of experts-solicited for the purpose of litigation-is hardly convincing on any objective standard short of complete deference [to the employer's decision]. Even in cases of public safety, [such deference is] not permit[ed]." Id.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. Complainant James A. Montz and the Iowa Civil Rights Commission (through his complaint) are entitled to judgment because they have proven age discrimination in employment by Respondents Civil Service Commission and City of Estherville, Iowa in violation of Iowa Code §§ 601A.6(l)(a) and 601A.6(l)(c).

B. Complainant James A. Montz is entitled to a judgment of eleven thousand nine hundred sixty-three dollars and zero cents ($11,963.00) in back pay for the loss resulting from Respondents' failure to hire him for the position of patrol officer.

C. Complainant Montz is entitled to a judgment of ten thousand dollars and zero cents ($10,000.00) in compensatory damages for the emotional distress he sustained as a direct result of the age discrimination practiced by the Respondents.

D. Complainant Montz is entitled to a judgment of one thousand five hundred forty-four dollars and seventy-one cents ($1,544.71) in compensatory damages for moving expenses.

E. Complainant Montz is entitled to a judgment of nine thousand dollars and zero cents ($9,000.00) in compensatory damages for the loss on sale of his house.

F. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Montz on his award of back pay, commencing on the date payment would have been made if Complainant had received employment with Respondents on November 8, 1989, and continuing until date of payment.

G. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Montz on the above award of emotional distress damages commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

H. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Montz on his award of moving expenses commencing on May 6, 1991, the billing date set forth in Complainant's exhibit 69, and continuing until date of payment.

I. Interest at the rate of eight percent per annum shall be paid by the Respondents to Complainant Montz on his award to compensate for the loss on the sale of his house, commencing on April 4, 1991, the interest rate and closing date set forth in Complainant's exhibit 69, and continuing until date of payment.

J. Within 45 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, Complainant Montz and the Respondents shall submit a written stipulation stating the amount of attorney's fees to be awarded Complainant. If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the proper amount of fees to be awarded. If no written notice is received by the expiration of 45 calendar days from the date of this order, the Administrative Law Judge shall schedule a conference in order to determine the status of the attorneys fees issue

and to determine whether an evidentiary hearing should be scheduled or other appropriate action taken. Once the full stipulation is submitted or the hearing is completed, the Administrative Law Judge shall submit for the Commission's consideration a Supplemental Proposed Decision and Order setting forth a determination of attorney's fees.

K. The Commission retains jurisdiction of this case in order to determine the actual amount of attorneys fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. This order is final in all respects except for the determination of the amount of the attorney's fees.

L. Respondents Civil Service Commission and City of Estherville, Iowa are hereby ordered to cease and desist from any further use of any maximum age hiring cap, effective immediately. An exception, necessary for compliance with Iowa Code § 400.17, is that Respondents need not consider applicants for patrol officer positions who will be over age 65 at time of appointment.

M. Respondents may, but are not required to, establish any lawful testing and monitoring programs which they believe are appropriate to the accomplishment of the public safety goals identified in this case. Such tests shall not include any age hiring cap not allowed under any other provision of this order nor shall such tests be conducted in a manner which constitutes illegal disparate treatment under any basis prohibited by the Iowa Civil Rights Act. Nor shall Respondents institute any tests known to have a disparate impact on any basis prohibited by the Iowa Civil Rights Act unless Respondents demonstrate both (a) that such tests have been validated for job relatedness under either the procedures set forth at 161 IAC 8.1 et. seq. or the Uniform Guidelines for Employee Selection Procedures, 29 C.F.R. S 1607.1 et. seq., and (b) alternative suitable hiring procedures with a reduced disparate impact are unavailable.

N. Respondents shall post, within 60 days of the date of this order, in conspicuous places at its locations in Estherville, Iowa, in areas where patrol officer application packets are given out, at least two copies of the poster, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

O. All of Respondents' future job advertising, whether print or otherwise, for a two year period commencing with the date of this order, shall state the Respondent is "An Equal Opportunity Employer". At any time during this two year period when job advertising of any nature is placed, Respondent shall also notify the Job Service of Iowa of the openings.

P. Respondents shall provide for the next three years, commencing one year from the date of this order, an annual written report to the Commission, indicating the name, age, address and telephone number of each applicant for a patrol officer position. Such report shall indicate whether each applicant made the certified list, whether an offer was extended to each applicant making the list, and, if the applicant either failed to make the certified list or to be offered employment as a patrol officer, set forth the reasons why. The Respondent shall maintain all applications considered or received over this three year period until four years from the date of this order, and shall make these and all other application materials available to the Commission's representatives for inspection and copying upon request until the end of the four year period.

Q. Respondents shall file a report with the Commission within 120 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs A through I and L through P inclusive of this order.

Signed this the 13th day of July. 1992.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319
515-281-4480

FINAL DECISION AND ORDER AND REMAND FOR DETERMINATION OF ATTORNEY'S FEES

1. On this date, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order which is hereby incorporated in its entirety as if fully set forth herein.

2. In accordance with paragraph J on page 156 of the proposed decision and order, Complainant Montz and Respondents Civil Service Commission and City of Estherville, Iowa are required, "provided that agreement can be reached ... on this issue ... [to] submit a written stipulation stating the amount of attorney's fees to be awarded Complainant" within 45 calendar days of this order. "If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the amount of the fees to be awarded."

IT IS SO ORDERED.
Signed this the 28th-day of August, 1992.
Orlando Ray Dial, Chairperson
Iowa Civil Rights Commission
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